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Supreme Court of the United States

OCTOBER TERM, 19[illegible]

No. [illegible] 12

BANCO NACIONAL DE CUBA, PETITIONER,

vs.

PETER L. F. SABBATINO, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 4, 1962
CERTIORARI GRANTED FEBRUARY 18, 1963

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 403

BANCO NACIONAL DE CUBA, PETITIONER,

vs.

PETER L. F. SABBATINO, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. A]

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 26986.

BANCO NACIONAL DE CUBA, Appellant,

against

PETER L. F. SABBATINO, as Receiver, and F. SHELTON FARR, WILLIAM F. PRESCOTT, EMMET WHITLOCK, LAWRENCE H. DIXON, H. BARTOW FARR, ELIZABETH C. PRESCOTT, FABIÓ FREYRE and HELEN G. DOWNS, co-partners doing business as FARR, WHITLOCK & Co., Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Joint Appendix—Filed August 29, 1961

[File endorsement omitted]

[fol. 1]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

60 Civ. 3929

BANCO NATIONAL DE CUBA,

vs.

PETER L. F. SABBATTINO, as Receiver and F. SHELTON FARR, WILLIAM F. PRESCOTT, EMIT WHITLOCK, LAWRENCE H. DIXON, H. BARTOW FARR, ELIZABETH C. PRESCOTT, FABIO FREYRE and HELEN G. DOWNS, co-partners doing business as FARR, WHITLOCK & Co.

DOCKET ENTRIES

Date	*Proceedings*
Oct. 10-60	Filed complaint and issued summons.
Oct. 11-60	Filed affdvt. of service, served deft. Sabbatino with copy of order & complaint 10-10-60; served deft. Farr Whitlock & Co. 10-10-60.
Oct. 19-60	Filed receiver's affdvt. & notice of motion to dismiss etc. 10-25-60.
Oct. 20-60	Filed summons & return served the following defts. 10-14-60: Peter Sabbatino, Emit Whitlock, Lawrence Dixon, H. Bartow Farr, Elizabeth Prescott, Fabio Freyre & Helen G. Downs.
Nov. 3-60	Filed amendment to complaint.
Nov. 3-60	Filed pltff's affdvt. & notice of motion for summary judgment—Ret. 11-10-60.
Oct. 11-60	Filed affdvt. & show cause order (filed in court)—for 3 Judge Court—for the purpose of an application for a temporary injunction—Ret. 11-10-60.

[fol. 2]

Nov. 10-60—Filed consent, stip. & order extending time for defts. F. Shelton Farr, et al. to answer to 11-18-60—Clerk.

Nov. 18-60—Filed answer, cross-claim & counterclaim of defts. F. Shelton Farr, William F. Prescott, Emmet Whitlock; Lawrence H. Dixon & Farr Whitlock & Co.

Nov. 28-60—Filed pltff's motion to dismiss counter claim ret. 12-6-60.

Nov. 29-60—Filed deft. Farr, Whitlock & Co. affdvt. & notice of cross motion to dismiss ret. 12-6-60.

Nov. 29-60—Filed deft. Farr, Whitlock & Co. affdvt. & notice of motion for summary judgment ret. 12-6-60.

Dec. 2-60—Filed deft's—Peter L. F. Sabbatino—affdvt. and notice of motion to dismiss amendment ret. 12-6-60.

Dec. 2-60—Filed deft's—Peter L. F. Sabbatino—affdvt. & notice of motion to dismiss cross claim ret. 12-6-60.

Dec. 16-60—Memo endorsed on show cause order filed in Court 10-11-60—Motion withdrawn. So ordered—Dimock, J.

Feb. 14-61—Filed Opinion #26,667—Motion to dismiss the counterclaim is denied—Weinfeld, J. Mailed notices.

Feb. 15-61—Filed deft. Farr, Whitlock & Co.'s memorandum in opposition to motion.

Feb. 15-61—Filed pltff's membrandum in support of motion to dismiss.

[fol. 3]

Mar. 27-61—Filed pltff's reply to counterclaim.

Mar. 31-61—Filed Opinion #26,794—Since pltff's motion for summary judgment against defts. Farr, Whitlock and the receiver must be denied and there is no issue of fact, summary judgment dismissing the complaint is ordered—So ordered—Dimock, J. Mailed notices.

Mar. 31-61—Filed judgment that defts. have judgment against the pltff.—Clerk.

Mar. 31-61—Memo endorsed on motion filed 12-2-60.—see opinion—Dimock, J.

Mar. 31-61—Memo endorsed on affdvt. filed 10-19-60.—see opinion—Dimock, J.

Mar. 31-61—Memo endorsed on cross motion filed 11-29-60—see opinion—Dimock, J.

Mar. 31-61—Memo endorsed on motion filed 12-2-60—see opinion—Dimock, J.

Apr. 3-61—Filed affdvt. of Harold L. Fisher in opposition.

Apr. 3-61—Filed affdvt. of Harold L. Fisher in opposition to summary judgment.

Apr. 3-61—Filed reply affdvt. of Victor Rabinowitz.

Apr. 3-61—Filed affdvt. of Harold L. Fisher in opposition to summary judgment.

Apr. 3-61—Filed affdvt. of Robert L. Augenblick.

Apr. 18-61—Filed notice of appeal—copies to Choate, M., B. & N.—Harold L. Fisher & R. J. D.

May 26-61—Filed certification of record to U. S. C. A.

[fol. 4]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

COMPLAINT—October 10, 1960

Plaintiff, for its complaint, alleges:

1. The jurisdiction of this Court is invoked

(a) under 28 U. S. C., § 1331, in that this action arises under the Constitution of the United States, and more particularly, under Article III, which gives to the President sole and exclusive power to conduct foreign relations on behalf of the Federal Government, under Article I, Section 8, Clause 3, and under the Fourteenth Amendment to the Constitution, as hereinafter more fully appears.

(b) under 28 U. S. C., 1332, in that plaintiff is a foreign corporation, having been organized under the laws of the Republic of Cuba, and defendants are citizens of the State of New York, New Jersey and Florida.

The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand ($10,000.00) Dollars.

2. The purpose of this action is to restrain the enforcement, operation and execution of § 977-b of the Civil Practice Act, a statute of the State of New York, by restraining the action of the defendant Sabbatino as an officer of the State of New York in the enforcement and execution of said statute on the ground that said statute is repugnant to the Constitution of the United States. Hence, a three-[fol. 5] judge court is required to be convened under 28 U. S. C. § 2281 and § 2284.

3. Plaintiff is a banking corporation, duly organized under and by virtue of the laws of the Republic of Cuba, having been organized by law 13 of December 23, 1948. It is authorized, *inter alia*, to serve as Financial Agent of the Republic. Fifty percent of its capital stock, plus one

share, is owned by the Republic of Cuba; fifty percent of its capital stock, less one share, is owned by private banking institutions situated in Cuba.

4. The defendant, Peter L. F. Sabbatino, is an officer of the State of New York, having been appointed a temporary Receiver of the assets, property, credits and choses of action, tangible or intangible, within the State of New York, Compania Azucarera Vertientes-Camaguey de Cuba (hereinafter referred to as "C.A.V."), pursuant to an order of the Supreme Court of the State of New York, Kings County, made on August 16, 1960. Defendants, F. Shelton Parr, William F. Prescott, Emet Whitlock, Lawrence H. Dixon, H. Bartow Farr, Elizabeth C. Prescott, Fabio Freyre and Helen G. Downs, are co-partners doing business under the name of Farr, Whitlock & Co. Said partnership is engaged in the business of acting as commodity brokers and has offices located in the City, County and State of New York. All of the members of said co-partnership are citizens of the State of New York except that defendant Freyre is a resident of the State of Florida and defendant Downs is a resident of the State of New Jersey. All of said defendants will be referred to herein collectively as defendant, Farr, Whitlock & Co.

5. On August 6, 1960 by operation of Executive Power Resolution #1 issued pursuant to Law No. 851 of July 6, 1960, the Government of the Republic of Cuba nationalized [fol. 6] all of the property and enterprises of a number of corporations existing under and by virtue of the laws of Cuba engaged in the business of manufacturing sugar; one of the corporations so nationalized was C.A.V., a corporation existing by virtue of the laws of the Republic of Cuba.

6. Subsequently and on or about August 9, the Government of Cuba, acting through Banco Para El Commercio Exterior de Cuba, a public corporation wholly owned by the Government, sold a quantity of sugar and shipped the same to a principal of the defendant, Farr, Whitlock & Co., located at Casablanca, Morocco, under an agreement by the terms of which payment was to be made for such shipment of sugar by defendant Farr, Whitlock & Co. upon

presentation to it of a draft accompanied by appropriate bills of lading; thereafter, Banco Para El Commercio Exterior de Cuba assigned its claims for such payment to plaintiff.

7. Plaintiff, in accordance with usual and customary commercial practice, sent its draft together with the appropriate bills of lading to Societe Generale, the New York agent of the plaintiff, with instructions to deliver said documents to defendant Farr, Whitlock & Co. upon payment of the sum of $175,250.69.

8. On September 29, 1960, at about 10:00 o'clock in the forenoon, Societe Generale presented said documents to defendant, Farr, Whitlock & Co. for payment. Said defendant advised Societe Generale that it would make payment later in the day after it had had an opportunity to inspect said documents.

9. On the afternoon of September 29, 1960, defendant Farr, Whitlock & Co. advised Societe Generale that it had disposed of the documents in question and had received [fol. 7] payment therefor but that it would not pay to Societe Generale, as Agent for plaintiff, the sum of $175,250.69 because it had been advised of the appointment by the Supreme Court of the State of New York, County of Kings, of a Receiver of the assets of C.A.V., which claimed to be the owner of the sugar shipped as aforesaid.

10. In fact, an order purporting to appoint defendant Sabbatino as Receiver under said statute had been made *ex parte* on or about August 16, 1960.

11. Thereafter, Societe Generale protested said refusal of defendant Farr, Whitlock & Co. to pay the draft or, in the alternative, to return the said documents but defendant Farr, Whitlock & Co. refused and still does refuse to return such documents or to make payment therefor.

12. In receiving and disposing of said bills of lading which had been delivered to it only on condition that payments be made therefor, and in failing and refusing to make such payments defendant Farr, Whitlock & Co. acted improperly, illegally, and contrary to normal and usual

commercial practice and contrary to the laws of the State of New York; such action by Farr, Whitlock & Co. amounted to illegal conversion by it of the said bills of lading and of the said fund of $175,250.69 received by it for the account of plaintiff.

13. Upon information and belief, defendant Sabbatino as Receiver claims the right to take possession of the said fund of $175,250.69 now in the possession of defendant Farr, Whitlock & Co. and to distribute said fund in accordance with the provisions of the aforesaid § 977b of the Civil Practice Act; defendant Farr, Whitlock & Co. threatens to deliver said fund to said Receiver, and unless restrained by this Court said Receiver will take possession of said fund and will proceed to so distribute it.

[fol. 8] 14. On or about January 7, 1959, the present Government of the Republic of Cuba was recognized by the President of the United States; by virtue of said recognition no act of the Government of Cuba as to property within its jurisdiction may be impeached or questioned by the courts of the United States.

15. Said Section 977b is unconstitutional in that

(a) it is in violation of the Constitution of the United States, which gives to the President of the United States sole and exclusive power to conduct foreign relations on behalf of this country;

(b) it deprives plaintiff of its property in violation of the due process clause of the Fourteenth Amendment to the Constitution;

(c) it places a burden upon commerce in violation of Article I Section 8 Clause 3.

16. By reason of the foregoing, plaintiff will suffer irreparable injury unless it secures relief by order of this Court; plaintiff has no other adequate remedy available to it in that recourse to the State courts will cause great delay in the adjudication of its claim. Furthermore, the statutory and constitutional public policy of the United States would require that this issue be disposed of in this Court.

Wherefore, plaintiff demands judgment against the defendants as follows:

1. That defendant Farr, Whitlock & Co. deliver and pay over to plaintiff or to Societe Generale as its Agent the fund of $175,250.69 received by it for the account of plaintiff as hereinabove more specifically set forth.

[fol. 9] 2. That defendant Farr, Whitlock & Co., its agents, attorneys, servants and employees be enjoined from paying over all or any portion of said sum to defendant Sabbatino.

3. That defendant Sabbatino, his agents, attorneys, servants and employees and all persons acting under or through his authority or by virtue of his office, be enjoined permanently from seizing or attempting to seize the said sum of $175,250.69 or any of the other moneys or properties of the plaintiff, from interfering in any way with the payment of said sum by defendant Farr, Whitlock & Co. to the plaintiff or its agent, and from enforcing or executing any powers pursuant to § 977b of the Civil Practice Act which would impeach or challenge the authority of the Republic of Cuba to nationalize property within its jurisdiction.

4. Declaring that § 977b of the Civil Practice Act as herein applied or sought to be applied is in violation of the Constitution, laws and treaties of the United States.

5. Pending the final determination of this action, that the Court grant a temporary injunction for the relief requested in paragraphs 1, 2 and 3 hereinabove, and

6. That the Court grant such other and further relief as may be just and proper in the premises.

New York, N. Y., October 10, 1960.

Victor Rabinowitz; Rabinowitz & Boudin, 25 Broad Street, New York, N. Y., Attorneys for Plaintiff.

[fol. 10]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

AMENDMENT TO COMPLAINT—October 31, 1960

Please take notice that pursuant to Rule 15(a), the plaintiff hereby amends its complaint herein as follows:

Paragraph 13 of the said complaint is amended to read:

"13. Defendant Sabbatino claims the right to take possession of the said sum of $175,250.69 and has, since the institution of this action, procured an order of the Supreme Court of Kings County, directing him to take possession of said sum; defendant Farr, Whitlock has since paid over such sum to said Receiver."

The final clause of the said complaint is amended to read:

"Wherefore, the plaintiff demands:

1. Judgment against defendant Farr, Whitlock in the sum of $175,250.69, together with interest;

2. Judgment declaring that § 977-b of the Civil Practice Act of New York as herein applied or sought to be applied is in violation of the Constitution, Laws and Treaties of the United States;

3. Judgment enjoining the defendant Sabbatino and all persons acting on his behalf from enforcing or exercising any powers pursuant to § 977-b of the Civil [fol. 11] Practice Act which would impeach or challenge the authority of the Republic of Cuba to nationalize property within its jurisdiction and more particularly enjoining the said defendant Sabbatino from holding or retaining or exercising any jurisdiction over the aforesaid sum of $175,250.69 heretofore paid to him as herein alleged."

Dated, New York, October 31, 1960.

Victor Rabinowitz; Rabinowitz & Boudin, 25 Broad Street, New York 4, N. Y., Attorneys for Plaintiff.

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

NOTICE OF MOTION FOR SUMMARY JUDGMENT—
October 31, 1960

Please take notice, that upon the annexed affidavit of Victor Rabinowitz, sworn to October 31, 1960, and the exhibits attached thereto, plaintiff will move this Court at a Motion Term thereof, to be held at the United States Courthouse, Room 506, Foley Square, Borough of Manhattan, City of New York, on November 10, 1960, at 10 o'clock in the forenoon, for an order pursuant to Rule 56:

1. Granting summary judgment in favor of the plaintiff against the defendant Farr, Whitlock & Co. in the [fol. 12] sum of $175,250.69, together with interest and the costs of this action, or, in the alternative,

2. Granting summary judgment against the defendant Sabbatino directing him to pay over to the plaintiff the sum of $175,250.69, and

granting such other and further relief as to the Court may seem just and necessary.

Dated, New York, October 31, 1960.

Yours, etc.,

Rabinowitz & Boudin, Attorneys for Plaintiff, Office & P. O. Address, 25 Broad Street, New York 4, N. Y.

To:

Harold L. Fisher and Ross J. DiLorenzo, Esqs., Attorneys for Defendant, Peter L. F. Sabbatino, Office & P. O. Address, 50 Court Street, Brooklyn, N. Y.

Choate, Mitchell, Baker & Nelson, Esqs., Attorneys for Defendant, Farr, Whitlock & Co., Office & P. O. Address, 43 Broad Street, New York, N. Y.

[fol. 13]

AFFIDAVIT OF VICTOR RABINOWITZ, READ IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

State of New York,
County of New York, ss.:

Victor Rabinowitz, being duly sworn, deposes and says:

I am a member of the firm of Rabinowitz & Boudin, attorneys for the plaintiff herein, and make this affidavit in support of a motion for summary judgment.

This action was commenced by the filing of a complaint on October 10, 1960. At the same time plaintiff obtained an order to show cause why a three-judge court should not be convened for the purpose of considering an application to enjoin the defendant Sabbatino from enforcing the provisions of § 977-b of the Civil Practice Act of New York on the ground that said section as applied in this situation is unconstitutional. That application has been adjourned on several occasions and is now returnable on November 10. This motion for summary judgment is being made returnable at the same time. The relief it seeks is alternative to the relief sought by the motion for an injunction. Similarly returnable on that day will be a motion by the Receiver to dismiss the complaint against him.

We do not believe that there is any dispute as to the facts relevant to this motion, the only issues being those of law. Hence a motion for summary judgment is appropriate. These facts are set forth: (1) in the affidavit of Raul Lopez Gonzales, attached to the plaintiff's motion for the appointment of a three-judge statutory court and [fol. 14] incorporated herein by reference; (2) in an affidavit by John A. Wilson, member of the firm of Shearman & Sterling & Wright, counsel for Compania Azucarera Vertientes-Camagney de Cuba (hereinafter referred to as C. A. V.); (3) an affidavit of Henry Blanchenay, Manager of Societe Generale, New York Agency; (4) an affidavit of Emmet Whitlock, one of the defendants and a member of the defendant firm of Farr, Whitlock & Co.; (5) an affidavit by Harold L. Fisher, attorney for the plaintiff. The last four affidavits have been filed in the Supreme Court, Kings

County, in an action entitled "Schwartz v. Compania Azucarera Vertientes-Camaguey de Cuba". Certified copies of those affidavits are annexed hereto.

The purpose of this affidavit is to set forth, in a single place for the Court's convenience, the facts on which this motion is based, such facts being derived from the affidavits above mentioned as well as other court records on file in the Kings County Supreme Court which your affiant has examined.

On February 5, 1960, and July 13, 1960, defendant Farr, Whitlock entered into two contracts with Banco Para el Comercio Exterior de Cuba, a public corporation wholly owned by the Government of Cuba, calling for the purchases of 22,176 bags of sugar. On August 6, 1960, the properties of C. A. V. were nationalized by the Cuban Government. Three days later, on August 9, 22,175 bags of sugar were shipped, pursuant to the aforesaid contracts, to Morocco. Thereafter, the bills of lading representing the sugar were assigned to plaintiff, a banking corporation in Cuba, a majority of the stock of which is owned by the Cuban Government (Whitlock affidavit, p. 2; Wilson affidavit, p. 2; Lopez affidavit, p. 2, and Exhibit 1 annexed thereto).

On August 23, plaintiff sent to Societe Generale, for collection, a sight draft for the purchase price of the sugar, namely, $175,250.69, drawn upon the defendant, [fol. 15] Farr, Whitlock & Co., together with bills of lading referring to the aforesaid sugar. Included were collection instructions from the plaintiff directing Societe Generale to deliver the draft and documents to Farr, Whitlock & Co., to receive payment of the draft and to remit the proceeds to plaintiff (Blanchenay affidavit, pp. 1 and 2; Exhibits A and B attached thereto).

Shortly after receiving the instructions Societe Generale attempted to deliver the draft and documents to defendant Farr, Whitlock, for payment. Said defendant refused to accept the documents, stating that only two of the three necessary copies of the shipping documents were included. Societe Generale, in accordance with usual commercial practice, offered a bank guarantee that the third set of documents would be delivered shortly, but Farr, Whitlock

refused to accept the guarantee, though such guarantees are almost universally accepted in such situations (Blanchenay affidavit, p. 2).

On August 26, the American management of C. A. V. wrote to Farr, Whitlock advising that it had been informed that a shipment of sugar produced by the Cuban mills of C. A. V. had been shipped to Morocco and that bills of lading covering the sugar were physically in New York. It was claimed that C. A. V. was the owner of the sugar and demand was made on Farr, Whitlock for delivery to it of the bills of lading and/or the proceeds of the sale. Enclosed was a copy of a notice of the appointment of a temporary receiver of the property of C. A. V. by the Supreme Court of Kings County, pursuant to § 977-b of the Civil Practice Act (Wilson affidavit, pp. 2 and 3, Exhibit 1 attached thereto).

Later on the same day a written agreement was entered into between Farr, Whitlock and C. A. V. It is annexed to the Wilson affidavit as Exhibit 2 and the Court is referred thereto for a full statement of its contents. In this writing defendant Farr, Whitlock agreed that it would [fol. 16] not pay over the sums due on the aforementioned draft, but would withhold the money. In return for this, Farr, Whitlock was to receive a fee in excess of $17,500 and an indemnity from C. A. V. against any loss which might accrue to it as a result of such withholding as well as legal representation in any suit against it for the proceeds of the sugar (except for an action brought by the receiver) (Wilson affidavit, p. 3, Exhibit 2 attached thereto).

Societe Generale, of course, had no knowledge of this agreement. On Monday, August 29, it had received the third set of shipping documents and at 10 A.M. it presented them and the draft to the defendant Farr, Whitlock for payment. "The representative of Societe Generale was told by the Farr, Whitlock & Co. representative that the latter wished to examine the documents to see that they conformed with the specifications of the contract and asked that the former return of 3:00 P.M., at which time Farr, Whitlock & Co. would make payment of the $175,250.26 if the documents were found to be in order. In accordance with the usual commercial practice of collecting banks in

New York, the papers were left with Farr, Whitlock & Co. for inspection." When Societe Generale returned at 3:00 P.M., for the proposed payment, it was told that payment would not be made because C. A. V. claimed the money. Thereupon the representative of Societe Generale asked for the return of the documents, but was told that they had been negotiated and that Farr, Whitlock had received payment for them (Blanchenay affidavit, pp. 2 and 3; Whitlock affidavit, p. 2).

Later in the day, at about 5 o'clock, defendant Farr, Whitlock received, for the first time, an order to show cause which contained a temporary restraining order enjoining any person on whom the order should be served from taking any act which might result from the removal from the State of New York of any property or assets of any kind belonging to or claimed by C. A. V. (Blanchenay [fol. 17] affidavit, pp. 3 and 4; Wilson affidavit, pp. 2 and 3). I have examined the original of that order and find that it was signed on August 29. Societe Generale immediately protested the failure to pay and has done so on several subsequent occasions (Blanchenay affidavit, p. 4).

In the meantime and on August 16, 1960, an action entitled *Schwartz* v. *Compania Azucarera Vertientes-Camaguey de Cuba* had been commenced in the Supreme Court of Kings County. In this action plaintiff, who alleges that he is a stockholder of the said corporation, sought the appointment of a receiver under the provisions of § 977-b of the Civil Practice Act. On that day, the defendant, Sabbatino had been appointed as temporary receiver. Thereafter, the management of the C. A. V. had moved by order to show cause dated August 29 (the order referred to in the last preceding paragraph) for a vacation of the receivership. That motion was denied by Judge Schwartzwald on September 8. In the order signed by him six days later, however, he did not continue in effect the temporary stay signed on August 29 and accordingly on September 15, 1960, Societe Generale, through its counsel, made another demand for payment on Farr, Whitlock. The latter, true to its agreement with C. A. V., again refused payment (Blanchenay affidavit, p. 4; Wilson affidavit, p. 3 and Exhibit 3 attached thereto).

On October 4, the temporary receiver moved to compel Farr, Whitlock to turn over the funds in its possession. That motion was returnable on October 11; a day prior thereto, this action was commenced, but this Court declined to stay the parties from proceeding in the Kings County Supreme Court. The Supreme Court has since entered an order directing Farr, Whitlock to pay over to the receiver the sum of $175,250.26, less a few hundred dollars which Farr, Whitlock claims as commissions. Upon information and belief, the money has since been turned over to defendant Sabbatino, as receiver.

[fol. 18] There the matter stands as of this moment. It is an elementary principle of law, which will be discussed in a memorandum to be submitted to the Court herewith, that the action of the Government of Cuba in nationalizing the sugar companies on August 6, 1960, cannot be challenged or impeached in the courts of this state and that, as a government recognized by our Government, it had the right to effect a transfer of title to the sugar in question. Quite aside, however, from this point, it seems clear that defendant Farr, Whitlock has engaged in a deliberate fraud, for a fee. Knowing as it did, on August 29, that there were various claims to the sugar and the proceeds from its sale, it had the alternative of either taking title to the sugar through acceptance of the bills of lading and payment of the draft or, alternatively, the rejection of the draft and the bills of lading. Instead, it adopted a third alternative; it accepted the bills of lading for the limited purpose of inspection; having taken the documents into its possession, it immediately negotiated them and refused to make payment therefor. This, we respectfully submit, was dishonest.

Victor Rabinowitz.

(Sworn to October 31, 1960.)

[fol. 19]

AFFIDAVIT OF JOHN A. WILSON, ANNEXED TO AFFIDAVIT OF VICTOR RABINOWITZ

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

Index No. 12167/60

NATHAN SCHWARTZ, Plaintiff,

against

COMPANIA AZUCARERA VERTIENTES-CAMAGUEY DE CUBA, Defendant.

State of New York,
County of New York, ss.:

John A. Wilson, being duly sworn, says:

(1) I am a member of the firm of Shearman & Sterling & Wright, the attorneys for the defendant corporation. I have been in charge of this action on its behalf since the commencement thereof and I am familiar with the facts hereinafter stated.

(2) I have read the affidavit of Harold L. Fisher, Esq., attorney for the Temporary Receiver herein, in support of said Temporary Receiver's motion to require Farr, Whitlock & Co., sugar brokers, of 120 Wall Street, New York City, to turn over and deliver to the Temporary Receiver $175,250.69, the proceeds of a shipment to Morocco of 22,175 bags of raw Cuban sugar, which were produced [fol. 20] at the Cuban mills of the defendant corporation and the proceeds of which are claimed by defendant as its property.

(3) There is now pending in the Appellate Division, Second Department, an appeal by the defendant corporation from an order of this Court denying defendant's motion to vacate the appointment, under § 977-b of the

Civil Practice Act, of the alleged Temporary Receiver of the New York assets of the defendant. On that appeal, defendant asserts that the appointment of the Temporary Receiver was not authorized under § 977-b and, moreover, constitutes an unconstitutional deprivation of defendant and its stockholders of their New York property, without due process of law, in violation of the Constitutions of New York and of the United States.

That appeal was argued on October 3, 1960, decision was reserved by the Appellate Division, and it has not yet been decided. I submit that until the validity of the alleged Temporary Receiver's appointment has been determined on said appeal, it would be premature for this Court to direct that any funds be turned over to the alleged Temporary Receiver by Farr, Whitlock & Co., particularly in view of the facts hereinafter mentioned.

(4) Farr, Whitlock & Co. refused to pay the $175,250.69 proceeds of said shipment of 22,175 bags of raw Cuban sugar to the Societe Generale, against the draft for $175,250.69, and the bills of lading and invoices presented to Farr, Whitlock & Co. by Societe Generale covering said shipment, under the following circumstances:

On August 26, 1960, the defendant corporation asserted its claim to the proceeds of said sugar shipment against Farr, Whitlock & Co. orally, and also sent Farr, Whitlock & Co. a letter, dated August 26, 1960, setting forth its claim to said proceeds, a copy of which letter is annexed as *Exhibit 1*. On the same day, August 26, 1960, the defen- [fol. 21] dant corporation and Farr, Whitlock & Co. entered into a memorandum agreement with respect to the proceeds of said sugar shipment, a copy of which is annexed as *Exhibit 2*.

It will be noted that as a part of said agreement, the defendant corporation undertook to defend Farr, Whitlock & Co. against all claims made against it by Societe Generale, Cuba, or others, and except for that agreement, the funds in question, namely, the $175,250.69, would long since have been paid over to Societe Generale and remitted by it to Cuba.

(5) Had the $175,250.69 proceeds of said sugar shipment been paid over by Farr, Whitlock & Co. to Societe Generale, and remitted by Societe Generale to Castro's Government in Cuba, this sum would have been forever lost to the Cuban Government. But, because of the prompt action of the defendant corporation and its officers, Farr, Whitlock & Co. refused to pay the proceeds of said sugar shipment to Societe Generale and they are still held here in New York, available to the claim of the defendant corporation. However, Societe Generale itself is asserting that it is entitled to require Farr, Whitlock & Co. to pay over said funds to Societe Generale.

(6) Annexed hereto as *Exhibit 3* is a copy of a letter from Messrs. Davis, Polk, Wardwell, Sunderland & Kiendl, attorneys for the Societe Generale, to Farr, Whitlock & Co., dated September 15, 1960, repeating the demand of Societe Generale that said $175,250.69 be paid over to it by Farr, Whitlock & Co. Under these circumstances, where title to said funds is in dispute, it is respectfully submitted that until *title* to said funds has been determined, the Court should not direct payment thereof to the Temporary Receiver, and that said Receiver's present motion is clearly premature.

[fol. 22] Wherefore, it is submitted:

(A) That the motion of the alleged Temporary Receiver should be denied, without prejudice to a future application for such relief under different factual circumstances.

(B) If the Temporary Receiver's application should be granted, then the alleged Temporary Receiver should be required to post a bond for $250,000, as requested by Farr, Whitlock & Co. at the end of its opposing affidavit, sworn to October 7, 1960.

(C) But, since *the validity* of the alleged Temporary Receiver's appointment is now contested, the Court cannot properly permit any premium for such a bond to be charged against any of the assets of the defendant corporation, now in the possession of the alleged Temporary Receiver.

(D) Should that be done, and the alleged Temporary Receiver's appointment be vacated, the defendant corporation intends to hold the alleged Temporary Receiver, his counsel, and the plaintiff, personally responsible and liable to defendant for the amount of the premium of any such bond paid out of the corporate funds.

John A. Wilson.

(Sworn to October 10, 1960.)

[fol. 23]

EXHIBIT 1, ANNEXED TO AFFIDAVIT OF JOHN A. WILSON

August 26, 1960

Farr, Whitlock & Co.
120 Wall Street
New York 5, N. Y.

Dear Sirs:

We are informed that a shipment of approximately 22,175 bags of 250 lbs. each of raw Cuban sugar produced in Cuba by two mills of this Company (also known as Compania Azucarera Vertientes-Camaguey de Cuba) has been made from Cuba on the S.S. HORNFELS, which is now on the high seas enroute to Casablanca, Morocco. The two mills at which this sugar was produced, are Central Vertientes and Central Estrella, respectively located at Vertientes and Cespedes, in Cuba.

We are further informed that bills of lading covering the above raw sugar have been issued and are now physically in New York City, New York, in the possession of either Societe Generale or Farr, Whitlock & Co. We further understand that the above bills have been brought into the state for the purpose of obtaining payment from Farr, Whitlock & Co. of the purchase price for said raw sugar.

The above information is merely furnished to you for the purpose of identification of the sugar and the transactions to which this letter refers, and our description may not be completely detailed or accurate.

As you know, the Cuban Government recently took through "forced expropriation" and without compensation, the properties and enterprises located in Cuba owned by nationals of the United States, among which were all of this Company's properties and assets, including the sugar referred to above.

[fol. 24] Vertientes-Camaguey Sugar Company of Cuba, the undersigned, hereby notifies you that it, and not the Cuban Government or any of its agencies, is the owner of the raw sugar covered by the bills of lading referred to above, and hereby makes demand upon you for the delivery of the above-mentioned bills of lading and/or the proceeds of the sale of said sugar.

Vertientes-Camaguey Sugar Company of Cuba, the undersigned, reserves all of its rights with respect to any actions taken by you in the above matters without its consent and approval. Enclosed is a copy of a notice of the appointment of a temporary receiver pursuant to Section 977(b) of the Civil Practice Act of the State of New York which was delivered to our Assistant Secretary's office, in New York City, on August 23, 1960.

Very truly yours,

VERTIENTES-CAMAGUEY SUGAR
COMPANY OF CUBA

By A. G. GARBER
Assistant Secretary

[fol. 25]

EXHIBIT 2, ANNEXED TO AFFIDAVIT OF JOHN A. WILSON

MEMORANDUM OF AGREEMENT BETWEEN FARR, WHITLOCK & CO., AND COMPANIA AZUCARERA VERTIENTES-CAMAGUEY DE CUBA.

With respect to a shipment of approximately 22,175 bags of 350 pounds each of raw Cuban sugar produced by two mills ownership of which is claimed by Compania Azucarera Vertientes-Camaguey de Cuba (hereinafter called Vertientes-Camaguey), shipped from Cuba on the steamship Hornfels, title to which sugar is claimed by Vertientes-Camaguey, it is hereby agreed:

1) If Farr, Whitlock & Co., receives same, it will hold the approximate sum of $175,000.00 and any additional sums received by it, the proceeds of said sugar, until compelled by court order to pay over said sums to the receiver appointed by the New York Supreme Court for the New York assets of Vertientes-Camaguey, or to pay over said sums to anyone else.

2) Vertientes-Camaguey agrees that it will retain the approximate sum of $175,000.00 and any additional sums, proceeds of said sugar, if, as and when it receives said sums from the receiver or from Farr, Whitlock & Co., and will hold said sums in escrow to indemnify Farr, Whitlock & Co., against any claim with respect to said sugar by Cuba or any other party, except any claim by the receiver, for a reasonable time under the facts and circumstances as they may hereafter develop but not less than six years after Vertientes-Camaguey obtains possession of said sums or until the matters here involved are finally terminated.

3) Vertientes-Camaguey will defend, at its own cost and expense and by its own attorneys, any suit [fol. 26] against Farr, Whitlock & Co. concerning said sugar or the proceeds thereof, except any action or proceeding brought against them by the receiver.

4) Vertientes-Camaguey agrees to pay Farr, Whitlock & Co. 10% of the said approximately $175,000.00 and of any additional sums received by Vertientes-Camaguey, proceeds of said sugar, if, as and when Vertientes-Camaguey finally obtains possession and clear title to said funds, from the receiver or from Farr, Whitlock & Co., or from anyone else.

5) In the event that Farr, Whitlock & Co. does not receive the $175,000.00 General Sugar Estates agrees not to assert any claim against Farr, Whitlock & Co. in the regard to said sugar.

Dated: New York, New York:
August 26th, 1960.

FARR, WHITLOCK & Co.

By SHELTON FARR

COMPANIA AZUCARERA VERTIENTES
CAMAGUEY DE CUBA

By A. G. GARBER
Asst. Treasurer

Approved:

GENERAL SUGAR ESTATES, INC.

By A. G. GARBER
Asst. Treasurer

[fol. 27]

EXHIBIT 3, ANNEXED TO AFFIDAVIT OF JOHN A. WILSON

DAVIS POLK WARDWELL SUNDERLAND & KIENDL
15 Broad Street
New York 5, N. Y.

September 15, 1960

Farr, Whitlock & Co.
120 Wall St.
New York 5, N. Y.

Dear Sirs:

On behalf of our client, Societe Generale, we deliver herewith a copy of an order which was entered by the New York Supreme Court, Kings County in the matter of Schwartz v. Compania Azucarera Vertientes-Camaguey de Cuba (Index No. 12167/1960).

This order denies in all respects the motion brought on by the order to show cause dated August 29, 1960 to eliminate the temporary receiver. In view of the fact that the restraining provisions of the order to show cause are not continued, they are no longer effective, and accord-

ingly, we repeat, on behalf of our client, their demand that you make immediate payment of the $175,250.69.

Very truly yours,

Copy to Messrs. Beatty
Williamson
Wilson
Van Voorhies
Manheim

[fol. 28]

AFFIDAVIT OF HENRI BLANCHENAY, ANNEXED TO AFFIDAVIT OF VICTOR RABINOWITZ

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

Index No. 12167/1960

NATHAN SCHWARTZ, Plaintiff,

against

COMPANIA AZUCARERA VERTIENTES-CAMAGUEY DE CUBA, Defendant.

State of New York,
County of New York, ss.:

Henri Blanchenay, being duly sworn, says:

1. I am manager and principal officer of Societe Generale, New York Agency. I make this affidavit in opposition to the motion of Peter L. F. Sabbatino, the Temporary Receiver of the above named defendant corporation, brought on by order to show cause dated October 4, 1960. By such motion the Temporary Receiver seeks an order directing Farr, Whitlock & Co. to turn over $175,250.69 allegedly belonging to defendant corporation.

2. Societe Generale is a French banking institution which, through its New York Agency, is licensed under

the banking laws to do business in New York. The New York Agency maintains its office at 60 Wall Street, New York, New York and there carries on a limited banking [fol. 29] business, which includes the collection of drafts and other bills of exchange.

3. Societe Generale became involved in this matter in the following way: On August 23, 1960 the Banco Nacional de Cuba sent to the New York Agency for collection a sight draft for $175,250.69 drawn upon Farr, Whitlock & Co., 120 Wall Street, New York 5, New York. Along with the draft were certain documents, including bills of lading, referring to a shipment of sugar on S/S Hornfels from Cuba to Casablanca. There was included from the Banco Nacional de Cuba collection instructions which directed Societe Generale to deliver the draft and documents to Farr, Whitlock & Co., the drawee, to receive payment of the draft and to remit the proceeds by crediting the account of Banco Nacional de Cuba. A copy of the draft drawn upon Farr, Whitlock & Co. for $175,250.69 (front and back) and a copy of the collection instructions are annexed hereto as Exhibits A and B respectively.

4. Such collection instructions, the draft and the related documents were received by Societe Generale, New York Agency, as an ordinary commercial transaction in the normal and usual course of business. This bank collection was typical of those which occur frequently every day in New York City among banks here on behalf of other banking institutions, both foreign and domestic.

5. Shortly after receiving these instructions we attempted to deliver the draft and documents to Farr, Whitlock & Co. for payment. At that time Farr, Whitlock & Co. refused to accept the documents stating that only two of the necessary three copies of the shipping documents were included. Farr, Whitlock & Co. also declined the bank guarantee which we offered, guaranteeing that the third set would be delivered shortly, even though such [fol. 30] bank guarantees are generally given and are almost universally accepted in such situations. On Monday, August 29, 1960 we were in receipt of the third set of the

shipping documents and at about 10:00 a. m. presented them and the draft once again to Farr, Whitlock & Co. for payment. The representative of Societe Generale was told by the Farr, Whitlock & Co. representative that the latter wished to examine the documents to see that they conformed with the specifications of the contract and asked that the former return at 3:00 p. m. at which time Farr, Whitlock & Co. would make payment of the $175,250.69 if the documents were found to be in order. In accordance with the usual commercial practice of collecting banks in New York, the papers were left with Farr, Whitlock & Co. for inspection. When Societe Generale's representative returned at 3 o'clock he was informed that Farr, Whitlock & Co. would not make payment because they had been advised that the defendant corporation in this proceeding had claimed that the funds belonged to it.

6. In a documentary bank collection of this kind the collecting bank is entitled to receive either payment of the draft or return of the related documents, including the bill of lading. Accordingly, when payment was refused by Farr, Whitlock & Co. our representative demanded return of the documents, but Farr, Whitlock & Co. advised that they had already negotiated the documents and had received payment. Later that afternoon (August 29), Farr, Whitlock & Co. delivered to us a letter confirming their refusal to pay and stating that they had received formal notification of the appointment of a receiver of the defendant corporation and of an order to show cause bringing on a motion by the defendant corporation to vacate that receivership which contained a restraining order against the removal from New York State of any property or assets belonging to or claimed by defendant corporation.

[fol. 31] 7. On the next day we were informed, and I believe it to be the fact, that Farr, Whitlock & Co. had not received a copy of the restraining order until approximately two hours after that company refused to pay the draft. Since the restraining order by its own terms was not effective until actual service upon the parties, the refusal of Farr, Whitlock & Co. to pay the draft for $175,250.69

after having negotiated the documents was contrary to law and not in accordance with commercial practice. We thereupon formally protested the non-payment of the draft and served demand upon Farr, Whitlock & Co. for immediate payment, which was refused.

8. The motion to vacate the Temporary Receivership was denied by this Court in a decision dated September 8, 1960. This decision was implemented by an order, which was settled on notice, entered September 14, 1960 which denied the motion in all respects. This order did not in any way continue the provisions of the temporary restraining order which was included in the order to show cause bringing on the motion. Those restraining provisions thereupon lapsed, and we immediately advised Farr, Whitlock & Co. of that fact and again demanded payment, but once again were refused.

9. The present application by the Temporary Receiver fails to support the claim that the $175,250.69 being held by Farr, Whitlock & Co. rightfully belong to the defendant corporation and should not be remitted to Societe Generale as collecting agent. The fact is that these funds are not held by Farr, Whitlock & Co. in the name or to the credit of the defendant corporation. On the contrary, since Farr, Whitlock & Co. negotiated the documents attached to the draft, the $175,250.69 are held by that company to the credit of Societe Generale as collecting agent for Banco Nacional de Cuba. We believe, therefore, that [fol. 32] the motion of the Temporary Receiver should be denied in all respects.

10. In the capacity of collecting agent for Banco Nacional de Cuba, Societe Generale, New York Agency, has no interest in these monies beyond that of using due care in exercising all reasonable efforts to collect and of assuring that the rights of the forwarding bank are fully protected. To these ends, we

(a) have kept Banco Nacional de Cuba fully informed of Farr, Whitlock & Co.'s refusal to pay, of the proceedings in this action and of the instant motion by the Temporary Receiver;

(b) oppose the Temporary Receiver's application and respectfully request that it be denied; and

(c) urge that, if the Court should disagree with us, Banco Nacional de Cuba be given an opportunity to enter an appearance in this proceeding and be heard.

11. In resisting the instant application by the Temporary Receiver Societe General does not waive any rights that it or Banco Nacional de Cuba may have against Farr, Whitlock & Co. for damages for the wrongful refusal to pay the draft.

H. Blanchenay.

(Sworn to October 7, 1960.)

EXHIBIT A, ANNEXED TO AFFIDAVIT OF HENRI BLANCHENAY

Draft.

(See opposite) ☞

US$175,250.69

Havana	22	August	1960
Place	Day	Month	Year

At ——Sight——— of this SECOND OF EXCHANGE (First Unpaid)

Pay to the order of BANCO PARA EL COMERCIO EXTERIOR DE CUBA———————

———————————————————————————the amount of

ONE HUNDRED SEVENTY FIVE THOUSAND TWO HUNDRED FIFTY 69/100 U.S. DOLLARS——

Value of our invoice No. 600 covering 22,175 bags of Cuban Raw Sugar, shipped part of Santa Maria (Jucaro) Cuba, on August 9, 1960, per m/v HORNFELS, destination Casablanca, Morocco—Account Contracto Nos. 546—

CUSTOMER'S DRAFT

To Farr, Whitlock and Company

[redacted]
NAME OF DRAWEE

120 Wall Street
ADDRESS

[redacted] New York 5, N. Y.
CITY

BANCO PARA EL COMERCIO EXTERIOR DE CUBA

RECEIVED
APR 20 1963
OFFICE OF THE CLERK
SUPREME COURT, U.S.

[fol. 33]

See Opposite ☞

Pay to the order of
any Bk-G or banker
VALUE FOR COLLECTION
BANCO PARA EL COMERCIO EXTERIOR DE CUBA
Havana, Cuba

PAY TO THE ORDER OF

BANCO NACIONAL, New York Agency
Value for collection
BANCO NACIONAL DE CUBA

Authorized Signatures

[fol. 34]

EXHIBIT B, ANNEXED TO AFFIDAVIT OF HENRI BLANCHENAY

Collection Instructions.

See Opposite ☞

BANCO NACIONAL DE CUBA
DEPARTAMENTO DE CAMBIOS
LA HABANA, CUBA

REMITASE A
Remit to

ACUSE DE RECIBO
ACKNOWLEDGMENT

ENVIADO Sent	PLAZO Tenor	VENCIMIENTO Due	
a/c.	Sight.		

Nº 0151

Sírvanse remitirnos el efecto que a continuación se detalla para que se sirvan efectuarlo de cuenta, entregándolo contra pago a los vencimientos indicados.
Gentlemen: We remit the following item for collection, remembering to proceed in accordance with the following instructions:

REMESA CONTRA A Endorsement to	FU No. - Their No. - Bill of Exchange - Trade date	Vencimiento — Tenor
Banco ... de Cuba.	Nº-1739 Agosto 20, 1960	BANCO P. A. EL COMERCIO EXTERIOR de Cuba
GIRADO Drawee	DIRECCION — Address	CANTIDAD DEL GIRO — Amt. of Draft
Farr, Whitlock and Company	120 Wall Street New York 5, N.Y.	$171,2[illegible].89

DOCUMENTOS Documents	Letras Drafts Sección Sight	Letras Drafts Sección Usos	Letras a Largo Plazo Bills of Exch. Long Term	Letras a Corto Plazo Bills of Exch. Short Term	Letras a Plazo Fijo Bills of Exch. Fixed Term	Letras a Plazo Diferido Bills of Exch. Deferred Term	Otros Others Sección Varios	MISCELANEOS Miscellaneous
ADJUNTOS Attached	4/5		6/7				1/3	[illegible]
PROXIMO CORREO Next Mail	1/5		1/7				2/3	[illegible]

Importe Amount: Banco
Plazo Tenor: Sight
Vence Due:
Cuenta de Cobro Bill of Lading
Nº

INSTRUCCIONES: LES ROGAMOS SEGUIR LAS MARCADAS X
Instructions: Please follow those marked

- [X] ENTREGAR DOCUMENTOS CONTRA Your documents against
- [ ] SIRVAN ACEPTACION POR Advise acceptance by
- [ ] AVISEN NO ACEPTACION Advise non acceptance
- [X] AVISEN PAGO POR Advise Payment by
- [X] AVISEN NO PAGO POR Advise non payment by

ACEPTACION Acceptance — CORREO AEREO Air Mail — CABLE
PAGO Payment — CABLE

- [ ] NO PROTESTAR POR FALTA Do not protest for non acceptance / non payment
- [ ] ACEPTACION Acceptance — CABLE
- [ ] PAGO Payment — CABLE

- [ ] EN REEMBOLSO SIRVANSE Kindly remit by reimbursement please
- [ ] SIN REEMBOLSO SIRVANSE Kindly remit without reimbursement please
- [X] ABONAR NUESTRA CUENTA CON USTEDES Credit our account with your goodselves
- [ ] REMITIR EL PRODUCTO A Remit proceeds to

PARA NUESTRO GIRADO SIRVANSE AVISAR To our drawee please advise

RECIBIDOS EL EFECTO Y LAS CONDICIONES ARRIBA INDICADAS, PUEDE USTED DISPONER DEL IMPORTE
We acknowledge receipt of the item and documents above mentioned for collection as per instructions.

FIRMADO DEL BANCO

Firma Autorizada

DE → [illegible] GENERALE, New York Agency
[illegible] Wall Street
New York 5, N.Y.
U. S. A.

3

[fol. 36]

AFFIDAVIT OF EMMET WHITLOCK, ANNEXED TO AFFIDAVIT OF VICTOR RABINOWITZ

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

Index No. 12167/1960

NATHAN SCHWARTZ, Plaintiff,

against

COMPANIA AZUCARERA VERTIENTES-CAMAGUEY DE CUBA, Defendant.

State of New York,
County of Kings, ss.:

Emmet Whitlock, being duly sworn, deposes and says:

That he is a partner in the firm of Farr, Whitlock & Co., with offices at 120 Wall Street, New York, New York, engaged in the business of buying and selling raw sugar and acting as brokers in the purchase and sale of raw sugar throughout the world.

That this Affidavit is made in opposition to the Order to Show Cause of Harold L. Fisher dated October 4th, 1960, and signed by Hon. George Eilperin, a Justice of this Court, requesting this Court to issue an order directing Farr, Whitlock & Co. to transfer to Peter L. F. Sabbatino, the Temporary Receiver of the above named defendant corporation, any and all moneys held by the company either for or to the account of the defendant corporation or any of its subsidiary companies.

[fol. 37] That this company holds certain sums of money to which the defendant corporation claims it is entitled, as will hereinafter more fully appear.

That heretofore Farr, Whitlock & Co. entered into a contract with Banco Cubano Del Comercio Exterior, a Cuban Bank, dated February 5, 1960 for the purchase by

the company of about 5,122 bags of Cuban Centrifugal Sugar. A second contract dated July 13, 1960 was entered into between the company and the same bank, under its present name of Banco Para El Comercio Exterior Del Cuba, for the purchase by the company of about 17,054 bags of the same sugar.

That deponent is advised that on or about August 9, 1960, at the Port of Santa Maria (Jucaro) Cuba, 22,175 bags of Cuban Centrifugal Sugar were shipped under these contracts on the S. S. Hornfels for destination Cacablanca, Morocco.

That on August 29, 1960, Societe Generale, a French Bank, through its agency in New York City, as correspondents for the National Bank of Cuba representing Banco Para El Comercio Exterior Del Cuba presented to the company a sight draft and supporting documents relating to the said shipment of sugar on the S. S. Hornfels calling for payment by the company of the sum of $175,250.69.

That on the same day the company completed the sale of the entire shipment of sugar to a purchaser in New York City to whom the bills of lading representing the shipment were delivered and payment therefor received.

That the company refused to pay the amount of the draft to the Societe Generale, New York Agency, for reasons which will more fully appear.

That at about 5:00 o'clock in the afternoon on said August 29, 1960, an Order to Show Cause signed by Hon. Lewis W. Olliffe, a Justice of this Court, was served upon Farr, Whitlock & Co. enjoining and restraining the company from taking any act or action which may result in the [fol. 38] removal from the State of New York of any property or assets of any kind belonging to or claimed by the defendant corporation, and prior thereto the company had received notice in writing from the defendant corporation that it claimed ownership of the sugar purchased by the company and shipped as aforesaid.

That on August 30, 1960 and on various occasions subsequent thereto Societe Generale, New York Agency, protested the failure of Farr, Whitlock & Co. to pay the said draft for $175,250.69 and reiterated its demand that the company pay such sum to the Bank, and on or about Sep-

tember 29, 1960, the Temporary Receiver appointed for the defendant corporation herein also demanded that the company pay such sum to him for the purchase price of the sugar.

That the company has refused to pay said sugar to defendant corporation or the Temporary Receiver or Societe Generale, New York Agency, for the reason that it is unable to determine the question of ownership of the sugar and is awaiting the direction of the Court upon determination of the issues presented by the conflicting claims in the sugar.

That the company claims certain sums as a deduction against said purchase price of the sugar, to wit, amounts as yet undetermined for commissions on the transaction and for demurrage demanded by the shipowner in connection with the loading of the S. S. Hornfels as aforesaid.

That in addition to said sum of $175,250.69 the company is in the process of collecting from various owners of steamships whatever sums of money may be due to General Sugar Estates, Inc. on account of despatch in the loading of said steamships under various contracts between Farr, Whitlock & Co. and General Sugar Estates, Inc. The exact amount of despatch money which the company will succeed in collecting and which will then be payable to General Sugar Estates, Inc. cannot be determined at this time, but in any [fol. 39] event the amount will not exceed $10,000.00 and is subject to a charge of $350.00 in favor of Farr, Whitlock & Co. for weighing and sampling in the United Kingdom of a cargo of sugar for General Sugar Estates, Inc.

That except for the foregoing sums, your deponent does not know of any assets in the company's possession belonging to the defendant corporation or to which the defendant corporation may lay claim.

Wherefore, deponent respectfully requests that the relief requested in the Order to Show Cause herein be in every respect denied; provided, however, that if this Court shall see fit to enter an order directing and requiring the company to turn over any of the aforementioned sums to the Temporary Receiver or to the defendant corporation, or to any other person, firm or corporation, your deponent re-

spectfully requests that such order further require the said Temporary Receiver or defendant corporation or such other person, firm or corporation, to give security to be approved by the Court in the amount of at least $250,000.00 in order to indemnify Farr, Whitlock & Co., and each and every partner thereof, from any and all damages, costs, expenses and attorney's fees which the company or any of its said partners may sustain or incur as a result of any proceeding now or hereafter brought against the company or any of its said partners on account of the purchase, shipment or sale of the aforesaid sugar.

Emmet Whitlock.

(Sworn to October 7, 1960.)

[fol. 40]

AFFIDAVIT OF HAROLD L. FISHER, ANNEXED TO AFFIDAVIT OF VICTOR RABINOWITZ

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

Index No. 12167/1960

NATHAN SCHWARTZ, Plaintiff,

against

COMPANIA AZUCARERA VERTIENTES-CAMAGUEY DE CUBA, Defendant.

State of New York,
County of Kings, ss.:

Harold L. Fisher, being duly sworn, deposes and says:

1. I am one of the attorneys for Peter L. F. Sabbatino the Temporary Receiver of the above named defendant, and, as such, am fully familiar with all of the facts hereinafter set forth.

2. This is an application for an order directing and requiring Farr, Whitlock & Co. of 120 Wall Street, New York, New York, forthwith to turn over, deliver and transfer to the Temporary Receiver the sum of $175,250.69 held by that Company belonging to the defendant in this action. Formal demand for the turnover of said funds was heretofore made on September 29, 1960 upon Mr. Emmitt Whitlock, a partner of said Company.

[fol. 41] 3. Mr. W. S. Emmet of the law firm of Choate, Mitchell, Baker & Nelson, who was present at the time the demand was made answered for Mr. Whitlock. He stated that payment was refused because there had been a similar demand by the Societe Generale, New York Agency, upon Farr, Whitlock & Co. for this money.

4. (a) The following is a resume of the history of this transaction showing how the dispute has arisen.

(b) Farr, Whitlock & Co., acting as principal, entered into two purchase agreements with General Sugar Estate, Inc., a wholly owned subsidiary of the defendant corporation. The first of these two agreements was dated February 5, 1960, the second was dated July 13, 1960 pursuant to which Farr, Whitlock & Co. purchased a total of 22,175 bags of raw Cuban sugar that was produced by two mills owned by the defendant corporation. The shipment of sugar left Cuba aboard the S.S. Hornfels bound for Morocco.

(c) On August 23, 1960 the National Bank of Cuba, representing the Bank of Exterior Commerce of Cuba, presented to the Societe Generale, New York Agency, its correspondent, a sight draft and supporting documents calling for the payment by Farr, Whitlock & Co. of the aforesaid sum of $175,250.69 for the sugar involved. The Societe Generale presented these documents to Farr, Whitlock & Co. I am informed that because of the fact that a certified copy of the order appointing the Receiver in this action was served upon such Company no payment was made to the Societe Generale.

5. I am further informed that the sugar involved was a product of and was owned by the defendant corporation

herein and that the only claim thereto by the National Bank of Cuba or any other bank in Cuba or the Cuban Govern-
[fol. 42] ment was the result of the forced expropriation and nationalization of all of the assets and properties of the defendant corporation and its subsidiaries located in Cuba.

6. There is no doubt in your deponent's mind that the sugar in question originally was the property of the defendant corporation. The defendant corporation is likewise of the same opinion since on August 26, 1960 it wrote to Farr, Whitlock & Co. advising said Company of the fact that it had been expropriated and demanded that the proceeds of the sale of said sugar be paid to it.

7. As aforestated the only claim to the funds herein involved made by the Societe Generale is that of a corresponding bank presenting negotiable documents on behalf of a foreign bank. Since in this case the foreign bank is the instrumentality of the Cuban Government which has nationalized and expropriated all of the properties of the defendant corporation, it is making an illegal claim to these funds. The Societe Generale, as the representative of the Cuban bank, likewise must be deemed to be making an illegal claim thereto.

8. On August 16, 1960, Mr. Justice John E. Cone made an order pursuant to Section 977-b of the Civil Practice Act, in which, among other things, he appointed the Temporary Receiver, who thereafter duly qualified by filing his bond and oath.

9. Said order provided, among other things:

"• • • and the said receiver is directed to take, receive and reduce to his possession any and all assets, property, credits and choses in action, tangible or intangible within the State of New York, and hold the same until the further order of this Court, and it is further

[fol. 43] Ordered that the said temporary receiver shall have all the powers and duties in accordance with those herein provided for as are possessed by and con-

ferred upon receivers and trustees by the laws of the State of New York * * *."

10. Reference is made to Section 977-b of the Civil Practice Act and more particularly to the first sentence of subdivision 19 thereof, and all of subdivision 20 thereof, from which it clearly appears that title to the foregoing assets vest immediately in the Temporary Receiver upon the making of the order appointing him and that the Temporary Receiver is deemed to have possession thereof from the time a copy of the order appointing him is served together with a demand therefor.

11. Accordingly, it is respectfully requested that an order be made directing Farr, Whitlock & Co. forthwith to turn over, deliver and transfer to the Temporary Receiver herein the aforesaid $175,250.69 together with any other monies it now holds or which it may hereafter obtain belonging to the defendant corporation and its subsidiaries.

12. I am informed that the aforesaid Farr, Whitlock & Co. has a claim of $350.00 for supervision against the defendant corporation and a similar unliquidated claim for commissions on this transaction. If the Court desires it may permit Farr, Whitlock & Co. to pay the funds to the Temporary Receiver and give it permission to apply at the foot of the order to be entered hereon for repayment to it of the amounts due said Company on these claims.

13. This motion is brought on by way of an order to show cause so that the Temporary Receiver may obtain the Court's permission to proceed with this application and to serve the respondent that has assets belonging to the de- [fol. 44] fendant corporation and the other respondent that makes a claim thereto, both of whom are not parties to this action and have not appeared herein, and also to make provision for service of this order to show cause on the attorneys for these respective respondents who have represented them on examinations conducted by the Temporary Receiver. Permission to serve the annexed order to show cause pursuant to Rule 20 of the Rules of Civil Practice is sought.

Accordingly, it is respectfully requested that the annexed order to show cause be signed and that the relief requested therein be granted.

No previous application for the relief requested in the annexed order to show cause has heretofore been made to any Court, Judge or Justice thereof.

Harold L. Fisher.

(Sworn to October 3, 1960.)

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

ANSWER OF DEFENDANTS F. SHELTON FARR, WILLIAM F. PRESCOTT, EMMET WHITLOCK AND LAWRENCE H. DIXON

Defendants F. Shelton Farr (sued herein as "F. Shelton Parr"), William F. Prescott, Emmet Whitlock (sued herein as "Emet Whitlock") and Lawrence H. Dixon, as co-partners doing business under the name of Farr, Whitlock & Co., by Choate, Mitchell, Baker & Nelson, their attorneys, for their answer to the amended complaint herein:

[fol. 45] First: Deny knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph "1" of the amended complaint, except admit that defendants F. Shelton Farr, William Prescott, Emmet Whitlock, Lawrence H. Dixon, H. Bartow Farr and Elizabet C. Prescott are residents of the State of New York, that Fabio Freyre is a resident of the State of Florida, and that Helen G. Downs is a resident of the State of New Jersey, and that the amount in controversy exceeds, exclusive of interest and costs, the sum of $10,000.

Second: Deny knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs "2" and "3" of the amended complaint.

Third: Deny each and every allegation contained in paragraph "4" of the amended complaint, except admit that the Supreme Court of the State of New York, Kings County,

made an order dated August 16, 1960 respecting the appointment of defendant Peter L. F. Sabbatino as a temporary Receiver, and refer to the text of said order for the terms thereof, and admit that F. Shelton Farr (sued herein as "F. Shelton Parr"), William P. Prescott, Emmet Whitlock (sued herein as "Emet Whitlock"), and Lawrence H. Dixon are general partners doing business under the name of Farr, Whitlock & Co., and that H. Bartow Farr, Elizabeth C. Prescott, Fabio Freyre and Helen G. Downs are limited partners in said partnership; that said partnership engages in business as commodity brokers, and has offices located in the City, County and State of New York, and that all of said general partners and H. Bartow Farr are residents of the State of New York, and that Fabio Freyre is a resident of the State of Florida and that Helen G. Downs resides in the State of New Jersey.

Fourth: Deny knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs "5", "6" and "7" of the amended complaint.

[fol. 46] Fifth: Deny each and every allegation contained in paragraph "8" of the amended complaint, except admit that on August 29, 1960, at about 10 A. M. Societe Generale presented to Farr, Whitlock & Co. a draft for $175,250.69 and certain bills of lading.

Sixth: Deny each and every allegation contained in paragraph "9" of the amended complaint, except admit that on the afternoon of August 29, 1960, Farr, Whitlock & Co. advised Societe Generale orally in accordance with the substance of a letter (a copy of which is annexed hereto as Exhibit "A" and made part hereof) which Farr, Whitlock & Co. sent to Societe Generale that afternoon.

Seventh: Deny knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph "10" of the amended complaint, except admit that the order referred to was made on or about August 16, 1960.

Eighth: Deny each and every allegation contained in paragraph "11" of the amended complaint, except admit that Societe Generale protested non-payment of a draft for $175,250.69.

Ninth: Deny each and every allegation contained in paragraph "12" of the amended complaint.

Tenth: Deny each and every allegation contained in paragraph "13" of the amended complaint, except admit that defendant Peter L. F. Sabbatino, as Receiver, claims the right to take possession of the sum of $175,250.69 and has, since the institution of this action, procured an order of the Supreme Court of the State of New York, Kings County, directing Farr, Whitlock & Co. to deliver to said Receiver the sum of $175,250.69, less permitted commissions [fol. 47] of $1,314.38 and that defendant Farr, Whitlock & Co. has since paid over such sum of $173,936.31 to said Receiver in compliance with said order.

First Defense

Eleventh: The complaint fails to state a claim against these defendants upon which relief can be granted.

Second Defense

Twelfth: On or about August 11, 1960, Farr, Whitlock & Co. entered into two contracts with Banco Para El Comercio Exterior De Cuba, plaintiff's assignor referred to in the amended complaint, to wit, a contract dated February 5, 1960 for the purchase by Farr, Whitlock & Co. of about 5,122 bags of Cuban Centrifugal sugar, and a contract dated July 13, 1960, for the purchase of about 17,054 bags of such sugar, being the sugar referred to in paragraph "6" of the amended complaint.

Thirteenth: On information and belief, on or about August 12, 1960, said sugar was shipped from the Port of Santa Maria (Jucaro) Cuba on the SS Hornfels for destination Casablanca, Morocco.

Fourteenth: On August 29, 1960, Farr, Whitlock & Co. received from Societe Generale (on information and belief a French bank) claiming to act as agent for the plaintiff, bills of lading representing the aforesaid shipment of sugar, and on said day Farr, Whitlock & Co. negotiated said bills of lading to its customer in New York City and received the sum of $175,250.69 as the proceeds of the sugar.

[fol. 48] Fifteenth: On information and belief, that Compania Azucarera Vertientes-Camaguey De Cuba (hereinafter "Camaguey") is a foreign corporation organized and at all times mentioned in the amended complaint existing under the laws of the Republic of Cuba, with an office, prior to August 7, 1960, in Havana, Cuba, that there are issued and outstanding a total of 1,443,921 shares of Camaguey's capital stock traded in on the New York Stock Exchange and held in the names of approximately 6,000 stockholders of which more than 90% in number and ownership of stock are registered in the names of persons resident within the United States, that for a great many years Camaguey has maintained an office in New York, New York, that on or about August 6, 1960 the Castro government of Cuba purported to expropriate and seize Camaguey's properties and enterprises purportedly acting under the law referred to in paragraph "5" of the amended complaint.

Sixteenth: By letter (a copy of which is annexed hereto as Exhibit "B" and made a part hereof) received by Farr, Whitlock & Co. on August 29, 1960, Camaguey notified Farr, Whitlock & Co. that it claimed that the Cuban government recently took through " 'forced expropriation' and without compensation" its properties and enterprises located in Cuba including the aforesaid sugar shipped on the S.S. Hornfels, and made demand on Farr, Whitlock & Co. for the bills of lading relating to said sugar and/or the proceeds of the sale of said sugar.

Seventeenth: By order dated August 16, 1960, the Supreme Court of the State of New York, Kings County, appointed the defendant Peter L. F. Sabbatino as Receiver, pursuant to § 977-b of the New York Civil Practice Act, of the New York assets of Camaguey.

[fol. 49] Eighteenth: At about 5 P. M. on August 29, 1960, after Farr, Whitlock & Co. had received on said date the aforesaid sum of $175,250.69, an order to show cause signed by Hon. Louis W. Olliffe, a Justice of the Supreme Court of the State of New York, Kings County, was served upon Farr, Whitlock & Co. which, among other things, enjoined

and restrained any partnership or individual upon whom the order was served from taking any action which might result in the removal from the State of New York of any property or assets of any kind belonging to or claimed by Camaguey.

Nineteenth: By order dated October 24, 1960 (a copy of which is annexed hereto as Exhibit "C" and made a part hereof) granted upon motion of said Receiver, the Supreme Court of the State of New York, Kings County, directed Farr, Whitlock & Co. to make summary turnover to the said Receiver of the aforesaid sum of $175,250.69, being the proceeds of said sugar, less permitted commission of $1,314.38, and on October 26, 1960, in obedience to said order, Farr, Whitlock & Co. paid and transferred to said Receiver the sum of $173,936.31.

Third Defense

Twentieth: Repeat and reallege each and every allegation set forth in paragraphs "Twelfth" through "Nineteenth" hereinabove with the same force and effect as if herein alleged in full.

Twenty-first: If the Court finds that Camaguey was the owner of the aforesaid sugar at the time of its shipment on the S.S. Hornfels or is otherwise entitled to the proceeds of said sugar, plaintiff has no cause of action against Farr, Whitlock & Co.

[fol. 50] For a Cross-Claim Against Defendant Peter L. F. Sabbatino, as Receiver, Defendants F. Shelton Farr, William F. Prescott, Emmet Whitlock and Lawrence H. Dixon, as Co-Partners Doing Business as Farr, Whitlock & Co. Allege:

Twenty-second: Repeat and reallege each and every allegation set forth in paragraphs "Twelfth" through "Nineteenth" hereinabove with the same force and effect as if herein set forth in full.

Twenty-third: Plaintiff's amended complaint in this action is hereby incorporated herein by reference.

Twenty-fourth: If plaintiff should recover judgment in the amount of $175,250.69 against Farr, Whitlock & Co. as demanded in the amended complaint, defendant Peter L. F. Sabbatino, as Receiver, to whom Farr, Whitlock & Co. paid the sum of $173,936.31 as aforesaid, is liable to Farr, Whitlock & Co. for said $173,936.31, and Farr, Whitlock & Co. hereby asserts all its rights to indemnity from said Receiver by reason of the payment by Farr, Whitlock & Co. to said Receiver of the said sum of $173,936.31.

As a Counterclaim Against Plaintiff, Defendants F. Shelton Farr, William F. Prescott, Emmet Whitlock and Lawrence H. Dixon, as Co-Partners Doing Business as Farr, Whitlock & Co., Allege:

Twenty-fifth: Defendants F. Shelton Farr, William F. Prescott, Emmet Whitlock and Lawrence H. Dixon are co-partners doing business under the name of Farr, Whitlock & Co., with their principal office at 120 Wall Street, New York, New York, and are all citizens of the United States and residents of the State of New York. On information and belief, plaintiff is a foreign corporation organized and existing under the laws of the Republic of Cuba.
[fol. 51] The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.

Twenty-sixth: On information and belief, plaintiff is a banking corporation organized and existing under Cuban law, is the financial agent of the Republic of Cuba, more than 50% of its stock is owned by the Cuban government, is asserting herein a claim acquired by assignment without consideration from Banco El Comercio Exterior De Cuba, and brings this action for the benefit of the Cuban government.

Twenty-seventh: On information and belief, Banco El Comercio Exterior De Cuba is a corporation organized and existing under the laws of the Republic of Cuba, and is wholly owned by the Government of Cuba.

Twenty-eighth: On or about August 11, 1960, Farr, Whitlock & Co. entered into a contract, dated July 13, 1960, with Banco El Comercio Exterior De Cuba, acting as agent

of the government of Cuba, whereunder Banco El Comercio Exterior De Cuba agreed to sell, and Farr, Whitlock & Co. agreed to buy, 7,500 long tons of Cuban Centrifugal sugar at a purchase price of 3.25¢ per pound United States currency, and in entering into such contract, Farr, Whitlock & Co. relied upon representations made by agents of the Cuban government that the sugar was then owned by the Cuban government as a result of nationalization legislation.

Twenty-ninth: On information and belief, on or about August 12, 1960, said sugar was shipped from the port of Puerto Padre, Cuba aboard the S.S. Trevaylor for destination a port in Japan.

Thirtieth: On or about September 23, 1960, Farr, Whitlock & Co. paid in Canada to Banco El Comercio Exterior [fol. 52] De Cuba, acting as agent for the Cuban government, the sum of $412,807.12, being the agreed purchase price for said sugar, and Farr, Whitlock & Co. made such payment in the belief that said sugar was owned by the Cuban government and in reliance upon the aforesaid representations of agents of the Cuban government.

Thirty-first: On or about September 2, 1960, The Cuban-American Sugar Company (upon information and belief a New Jersey corporation) and The Cuban American Sugar Mills Company (upon information and belief a foreign corporation existing under Cuban law) served a summons and complaint on Farr, Whitlock & Co. in the Supreme Court of the State of New York, County of New York, and on or about September 15, 1960, served an amended complaint (a copy of which is annexed hereto as Exhibit "D"), which amended complaint alleges among other things, that said Cuban-American Sugar Company, through its wholly-owned subsidiary Cuban American Sugar Mills Company, was the owner of the aforesaid sugar shipped on board the S.S. Trevaylor, that Cuban nationalization legislation purporting to expropriate said sugar was invalid and did not effect their ownership thereof and that said two corporations were entitled to the proceeds of said sugar.

Thirty-second: If the Cuban government was not the owner of the sugar shipped as aforesaid on the S.S. Tre-

vaylor, then Farr, Whitlock & Co. paid the aforesaid $412,807.12 to Banco El Comercio Exterior De Cuba under a mistake of fact, to wit, that said Cuban government was the owner of the said sugar shipped on the S.S. Trevaylor, and that the Cuban government was entitled to said $412,807.12, and the Cuban government was thereby unjustly enriched in the amount of $412,807.12 and should make restitution therefor to Farr, Whitlock & Co.

[fol. 53] Thirty-third: Defendants F. Shelton Farr, William F. Prescott, Emmet Whitlock and Lawrence H. Dixon, as co-partners doing business as Farr, Whitlock & Co., have no adequate remedy at law.

Wherefore, the defendants F. Shelton Farr (sued herein as "F. Shelton Parr"), William F. Prescott, Emmet Whitlock (sued herein as "Emet Whitlock"), and Lawrence H. Dixon, co-partners doing business under the name of Farr, Whitlock & Co., demand judgment as follows:

(a) dismissing the amended complaint herein against them;

(b) that if there is any liability to plaintiff, defendant Peter L. F. Sabbatino, as Receiver, is solely liable to plaintiff;

(c) upon their cross-claim against defendant Peter L. F. Sabbatino, as Receiver, judgment against such Receiver for any sum which may be recovered against them herein by plaintiff; and

(d) upon their counterclaim against plaintiff,

(i) that the Court declare the legal rights of the plaintiff and said co-partners of Farr, Whitlock & Co. with respect to the $412,807.12 paid to plaintiff as aforesaid and the obligation of plaintiff to return said sum, with interest, to said co-partners,

(ii) if the Court finds that the Cuban government (or Banco El Comercio Exterior De Cuba) was not the owner of the aforesaid sugar shipped on the S.S. Trevaylor or otherwise not entitled to said $412,807.12, that the Court award judgment in favor of said co-partners and against plaintiff in the sum of $412,807.12,

with interest, or alternatively as a set-off, judgment in favor of said co-partners and against plaintiff in [fol. 54] the amount of any judgment which the Court may render in plaintiff's favor against said co-partners, and

(iii) granting to said co-partners of Farr, Whitlock & Co. such other and different relief against plaintiff as to the Court may seem just and proper;

together with the costs and disbursements of this action against plaintiff and/or defendant Peter L. F. Sabbatino, as Receiver.

Choate, Mitchell, Baker & Nelson, By .....
....., A Partner, Attorneys for Defendants, F. Shelton Farr, William F. Prescott, Emmet Whitlock and Lawrence H. Dixon, co-partners doing business as Farr, Whitlock & Co., Office & P. O. Address, 43 Broad Street, New York, New York.

[fol. 55]

EXHIBIT A, ANNEXED TO ANSWER OF DEFENDANTS F. SHELTON FARR, WILLIAM F. PRESCOTT, EMMET WHITLOCK AND LAWRENCE H. DIXON

August 29th, 1960

Societe Generale,
New York Agency,
60 Wall Street,
New York 5, N. Y.

Gentlemen:

We have received formal notification of the appointment by the Supreme Court, County of Kings, State of New York, of a receiver of the assets of Compania Azucarera Vertientes-Camaguey de Cuba. Furthermore, this morning the latter company notified us that they claimed to be the owners of the raw sugar shipped on the s/s HORNFELS for destination Casablanca, Morocco.

Under the circumstances, we are obliged to retain these sums due for the purchase price of the sugar until a court of competent jurisdiction shall have determined who has title to the sugar, whether it be the Cuban government or the Compania Azucarera Vertientes-Camaguey de Cuba or another, and upon such determination we shall pay the purchase price for the sugar as directed by such a court and upon such guarantees as we may require so that we shall not be prejudiced thereby.

We have also received formal notification of a motion in King's County Court to vacate that receivership and have an order of the court staying the officers, directors, agents and employees of Compania Azucarera Vertientes-Camaguey de Cuba and the officers, directors, agents and employees of any other corporation, partnership or any individual, upon whom a copy of the order may be served from taking any act or action which may result in the removal from the state of New York of any property or assets of any kind belonging to or claimed by Compania Azucarera Vertientes-Camaguey de Cuba.

Very truly yours,

FARR, WHITLOCK & Co.

[fol. 56]

EXHIBIT B, ANNEXED TO ANSWER OF DEFENDANTS F. SHELTON FARR, WILLIAM F. PRESCOTT, EMMET WHITLOCK AND LAWRENCE H. DIXON

Same as Exhibit I, Annexed to Affidavit of John A. Wilson, printed at pages 20-21.

EXHIBIT C, ANNEXED TO ANSWER OF DEFENDANTS F. SHELTON FARR, WILLIAM F. PRESCOTT, EMMET WHITLOCK AND LAWRENCE H. DIXON

At a Special Term, Part I of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, Civic Centre, in the Borough of Brooklyn, City of New York on the 24th day of October, 1960.

Present:

HON. JOHN E. CONE, Justice.

Index No. 12167/1960

NATHAN SCHWARTZ,

Plaintiff,

against

COMPANIA AZUCARERA VERTIENTES-CAMAGUEY DE CUBA,

Defendant.

PETER L. F. SABBATINO, the Temporary Receiver of the above named defendant, having moved this Court for an Order directing and requiring Farr, Whitlock & Co. to forthwith turn over, deliver and transfer to Peter L. F. Sabbatino, the Temporary Receiver of the above named defendant, any and all monies held by said Farr, Whitlock [fol. 57] & Co. either for or to the account of the defendant herein or any of its subsidiary companies and for such other and further relief as to the Court may seem just and proper in the premises, and said motion having duly come on to be heard on October 11, 1960,

Now, upon reading and filing the Order to Show Cause dated October 4, 1960, the affidavit of Harold L. Fisher, sworn to on October 3, 1960, the reply affidavit of Harold L. Fisher, sworn to on October 10, 1960, all submitted in support of the motion, the affidavit of Emmet Whitlock, sworn to on October 7, 1960, the affidavit of John A. Wilson, sworn to on October 10, 1960, the affidavit of Henri

Blanchenay, sworn to on October 7, 1960, all submitted in opposition to the motion, and after hearing Harold L. Fisher and Ross J. Di Lorenzo, Attorneys for the Temporary Receiver, by Harold L. Fisher, Esq., of counsel, in support of the motion, and Choate, Mitchell, Baker & Nelson, Attorneys for Farr, Whitlock & Co., by W. S. Emmet, Esq., of counsel, in opposition to the motion, Shearman & Sterling & Wright, Attorneys for the defendant, by John A. Wilson, Esq., of counsel, in opposition to the motion, and Davis, Polk, Wardwell, Sunderland & Kiendl, Esqs., Attorneys for Societe Generale, by Henry L. King, Esq., of counsel, in opposition to the motion, and due deliberation having been had thereon, and the Court having rendered its decision in writing dated October 13, 1960, it is

ORDERED, that the motion of the Temporary Receiver be and the same hereby is granted; and it is further

ORDERED, that Farr, Whitlock & Co. forthwith transfer to Peter L. F. Sabbatino, the Temporary Receiver, the sum of $175,250.69 now held by said Farr, Whitlock & Co. belonging to the within defendant; and it is further

ORDERED, that such funds are to be deposited with the Kings County Trust Company for the account of the [fol. 58] said Temporary Receiver to be held subject to the further order of the Court and not to be withdrawn except on such order and on notice to all parties; and it further

ORDERED, that Farr, Whitlock & Co. may deduct from the aforesaid $175,250.69 the sum of $1,314.38 rightfully due it for commissions from the defendant herein, transferring the balance remaining to the Temporary Receiver as aforesaid.

Enter

.....,

S. C.

EXHIBIT D, ANNEXED TO ANSWER OF DEFENDANTS F. SHELTON FARR, WILLIAM F. PRESCOTT, EMMET WHITLOCK AND LAWRENCE H. DIXON

AMENDED COMPLAINT

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

THE CUBAN-AMERICAN SUGAR COMPANY and THE CUBAN AMERICAN SUGAR MILLS COMPANY,

Plaintiffs,

against

FARR, WHITLOCK & Co., a co-partnership, and F. SHELTON FARR, LAWRENCE H. DIXON, WILLIAM S. PRESCOTT, and EMMET WHITLOCK, individually and as co-partners,

Defendants.

The amended complaint of The Cuban-American Sugar Company and The Cuban American Sugar Mills Company [fol. 59] against Farr, Whitlock & Co., a co-partnership, F. Shelton Farr, Lawrence H. Dixon, William S. Prescott and Emmet Whitlock, individually and as co-partners, respectfully alleges upon information and belief as follows:

First: Plaintiff Cuban-American Sugar Company is a foreign corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, maintaining an office and place of business at 347 Madison Avenue, New York 17, N. Y. A certificate authorizing plaintiff to do business in New York has been duly obtained.

Second: Plaintiff Cuban American Sugar Mills Company is a foreign corporation duly organized and existing under and by virtue of the laws of the Republic of Cuba and is a wholly-owned subsidiary of plaintiff Cuban-American Sugar Company.

Third: Defendant Farr, Whitlock & Co. is a co-partnership with its main office and place of business at 120 Wall Street, New York 5, N. Y. The remaining defendants

above named are general partners in Farr, Whitlock & Co., and all reside in the State of New York.

Fourth: Plaintiff Cuban-American Sugar Company, through its wholly-owned subsidiary plaintiff Cuban American Sugar Mills Company, owns extensive sugar-producing properties within the Republic of Cuba, and prior to July 20, 1960, engaged, through said wholly-owned subsidiary, in the production of Cuban sugar and caused such sugar to be sold exclusively to The Cuban-American Mercantile Corporation, a New Jersey corporation, also a wholly-owned subsidiary of plaintiff Cuban-American Sugar Company.

Fifth: On and after July 20, 1960, certain officials, purporting to act on behalf of the Government of Cuba, have, [fol. 60] by acts of intervention, seizure, and confiscation, unlawfully taken possession and control of the sugar and other properties owned by plaintiff Cuban-American Sugar Company through its wholly-owned subsidiary plaintiff Cuban American Sugar Mills Company in Cuba. Plaintiffs' said properties were taken without justification or compensation and in a manner contrary to the laws and public policy of the United States of America, the State of New York, and the Republic of Cuba, and contrary to established principles of international law.

Sixth: The Executive Branch of the United States Government, through its Department of State, in a series of diplomatic notes delivered to the Government of Cuba on July 16, 1960, August 8, 1960, and August 13, 1960, copies of the texts of which are attached hereto, marked Exhibits A, B, and C respectively, and made a part of this complaint, has taken the position that the Cuban law under which the intervention, seizure and confiscation of plaintiffs' sugar and other properties as aforesaid were undertaken is "manifestly in violation of those principles of international law which have long been accepted by the free countries of the West;" that the said law is "discriminatory, arbitrary and confiscatory"; and that it fails "to meet the most minimum criteria necessary to assure the payment of prompt, adequate and effective compensation." The Department of State has made "indignant protest" against

these actions, which are not recognized by the Executive Branch of the United States Government as resulting in the passage of the title to any of plaintiffs' Cuban properties, including the sugar referred to below, from plaintiffs to any other person.

Seventh: On July 25, 1960, and subsequently, defendants have been put on notice that the said seizure was illegal and contrary to law and public policy and that no [fol. 61] person had or has authority to pass title to, accept payment for, or otherwise deal with plaintiffs' said properties without express authorization from plaintiffs' officers in New York.

Eighth: Subsequent to their having been put on notice as aforesaid, defendants have purported to purchase, or to cause to be purchased by and through agents or instrumentalities of defendants, from persons in Cuba two or more shipments of Cuban sugar owned by plaintiff Cuban-American Sugar Company through its wholly owned subsidiary plaintiff Cuban American Sugar Mills Company, to-wit: approximately 3550 long tons shipped on or about August 17, 1960, on board the SS Bonita from Puerto Padre, Cuba, to Montreal, Canada; and approximately 7500 long tons shipped on or about August 13, 1960, on board the SS Trevaylor from Puerto Padre, Cuba, to Japan; and have purported to resell or to cause to be resold said sugar to third parties, and defendants or their agents or instrumentalities have or will come into possession or control of the proceeds of such purported resales. Said dealings were without plaintiffs' knowledge, consent, or authority.

Ninth: Defendants or their agents or instrumentalities have or will come into possession or control of the proceeds of said sugar as aforesaid with full knowledge of the circumstances under which plaintiffs were illegally deprived of said sugar and forced and compelled to relinquish control of said sugar contrary to law.

Tenth: Plaintiffs do not know and cannot now determine the amount of said proceeds, except that the amount is not less than $700,000, representing the two shipments of sugar aforesaid, and considerably more if additional ship-

ments have been purportedly purchased and resold in the manner aforesaid, or otherwise dealt with by defendants or their agents or instrumentalities.

[fol. 62] Eleventh: Plaintiffs have demanded that defendants pay or agree to pay to plaintiffs the proceeds from the purported sale or sales of said illegally-seized sugar or the market value thereof, whichever is greater, but defendants have failed and refused to do so.

Twelfth: By reason of the foregoing, plaintiffs are legally entitled to possession of the said sugar or the proceeds or the market value thereof, whichever is greater.

Wherefore, plaintiffs demand judgment:

1. Requiring defendants to deliver to plaintiffs said sugar and or the documents of title thereto, or to pay to plaintiffs any and all proceeds realized and to be realized by defendants from the resale or resales of said sugar or the market value thereof, whichever is greater;

2. Awarding to plaintiffs against defendants the damages suffered by plaintiffs as a result of defendants' conversion of said sugar or the proceeds thereof;

3. Ordering and requiring defendants to render an accounting to plaintiffs with respect to the defendants' purchase and resale of said sugar and the proceeds thereof;

4. Enjoining defendants from making any disposition of said sugar or the proceeds thereof, other than delivery or payment to plaintiffs;

5. And for such other, further or different relief as may be just in the premises.

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Plaintiffs
80 Broad Street
New York 4, N. Y.

[fol. 63]

EXHIBIT A, ANNEXED TO COMPLAINT OF CUBAN-AMERICAN SUGAR CO., EXHIBIT D TO ANSWER OF DEFENDANTS F. SHELTON FARR, WILLIAM F. PRESCOTT, EMMET WHITLOCK AND LAWRENCE H. DIXON

DEPARTMENT OF STATE

FOR THE PRESS

JULY 16, 1960 No. 397

UNITED STATES PROTESTS NEW CUBAN LAW

The United States' Ambassador to Cuba, Philip W. Bonsal, today delivered to the Cuban Ministry of Foreign Relations a note protesting the "Nationalization Law" of Cuba. Text of the note is as follows:

I have the honor to refer to the law issued by the Council of Ministers of the Government of Cuba on July 6, 1960, which is entitled, the "Nationalization Law" and which applies exclusively to nationals of the United States who own property in Cuba. I have been instructed by my Government to emphasize to Your Excellency that the Government of the United States considers this law to be manifestly in violation of those principles of international law which have long been accepted by the free countries of the West. It is in its essence discriminatory, arbitrary and confiscatory.

The Nationalization Law is discriminatory in that it is specifically limited in its application to the seizure of property owned by nationals of the United States.

It is arbitrary because it was admittedly enacted in retaliation for recent actions taken by the Congress and President of the United States to assure the needs of the sugar consuming public of the United States. These actions were required because of the publicly stated intention of the Government of Cuba to reduce its dependence on sugar concomitantly with its efforts to enlarge sales of sugar in newer markets and to alter radically its tradi-

[fol. 64] tional pattern of trade with the United States. Moreover the hostile attitude toward the United States so often expressed by the present Government of Cuba has made abundantly clear the economic imprudence of relying

on Cuba for a very high proportion of the United States need for this important commodity.

The Nationalization Law is both arbitrary and confiscatory in that its provisions for compensation for property seized fail to meet the most minimum criteria necessary to assure the payment of prompt, adequate and effective compensation and in its specific prohibition of any form of judicial or administrative appeal from the resolutions of the expropriating authorities.

I have been instructed by my Government to convey to Your Excellency a most solemn and serious protest against this hostile measure. I am further instructed to inform Your Excellency that should this law be employed by the Government of Cuba to seize properties of American nationals, it will be viewed by the Government of the United States as further evidence and confirmation of a pattern of economic and political aggression against the United States under the guise and pretext of accelerating the social and economic progress of the Cuban people.

• • •

State—RD, Wash., D. C.

[fol. 65]

EXHIBIT B, ANNEXED TO COMPLAINT OF CUBAN-AMERICAN SUGAR CO., EXHIBIT D TO ANSWER OF DEFENDANTS F. SHELTON FARR, WILLIAM F. PRESCOTT, EMMET WHITLOCK AND LAWRENCE H. DIXON

DEPARTMENT OF STATE

FOR THE PRESS

AUGUST 9, 1960 No. 441

UNITED STATES PROTESTS CUBAN SEIZURES OF PROPERTY

The United States Embassy at Habana yesterday delivered to the Cuban Ministry of Foreign Relations a note protesting the seizure of various U. S.-owned properties by that Government. Text of the note is as follows:

"Excellency:

"I have the honor to refer to this Embassy's note No. 344 dated July 16, 1960 in which, under instructions from

my government, I conveyed to Your Excellency a most solemn and serious protest against law number 851 of July 6, 1960 empowering the President and the Prime Minister of the Government of Cuba to decree the nationalization through expropriation of property located in Cuba of citizens of the United States of America. I stated and I reiterate that the law in question is in its essence discriminatory, confiscatory and arbitrary.

"Under date of August 6, 1960, pursuant to the above-cited law, the President and the Prime Minister have signed a resolution nationalizing through forced expropriation the properties of 26 companies wholly or partially owned by citizens of the United States of America.

"Under instruction from my government, I wish to express to Your Excellency the indignant protest of my government against this resolution and its effects upon the legitimate rights which American citizens have acquired under the laws of Cuba and under International Law.

"Accept, Excellency, the renewed assurances of my highest consideration."

* * *

State—RD, Wash., D. C.

[fol. 66]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

NOTICE OF CROSS-MOTION TO DISMISS COMPLAINT —November 8, 1960

Please take notice that upon the annexed affidavit of Winthrop S. Emmet, sworn to November 8th, 1960, defendant, Farr, Whitlock & Co., will make a cross-motion at the Motion Term of this Court, to be held at the United States Court House, Room 506, Foley Square, Borough of Manhattan, New York City, on November 10, 1960, at 10 A. M., for an order:

(1) Dismissing the complaint herein, dated October 10, 1960, as amended October 31, 1960, for lack of jurisdiction over the subject matter, as to said defendant, Farr, Whitlock & Co.; and

(2) For such further, other, or different relief as to the Court may seem just.

Dated: New York, N. Y., November 8, 1960.

Yours, etc.,

Choate, Mitchell, Baker & Nelson, By: Winthrop S. Emmet, Attorneys for Defendant, Farr, Whitlock & Co., Office & P. O. Address, 43 Broad Street, New York 4, New York.

[fol. 67] To:

Rabinowitz & Boudin, Esqs., Attorneys for Plaintiff, Office & P. O. Address, 25 Broad Street, New York 4, New York.

Harold L. Fisher & Ross J. Di Lorenzo, Esqs., Attorneys for Peter L. F. Sabbatino, Temporary Receiver, Office & P. O. Address, 50 Court Street, Brooklyn 1, New York.

[fol. 68]

AFFIDAVIT OF WINTHROP S. EMMET, READ IN SUPPORT OF CROSS-MOTION TO DISMISS COMPLAINT

State of New York,
County of New York, ss.:

Winthrop S. Emmet, being duly sworn, says:

1. I am a member of the firm of Choate, Mitchell, Baker & Nelson, attorneys for the defendant New York co-partnership, doing business under the name, Farr, Whitlock & Co., and I am fully familiar with the facts hereinafter stated.

2. Late on the afternoon of October 31, 1960, there was served upon the defendant co-partnership, Farr, Whitlock & Co., an amendment to the complaint herein, dated October 31, 1960. The complaint is dated October 10, 1960, and was served upon said defendant on October 14, 1960.

3. In the complaint, as amended, the plaintiff, Banco Nacional De Cuba, alleges that it is a banking corporation, organized under the laws of the Republic of Cuba. The Banco also alleges that it is authorized to serve as Financial

Agent of the Republic, which owns 50% of the Banco's stock, plus one share, and that 50% of its stock, less one share, is owned by private banking institutions in Cuba.

4. The amended complaint seeks relief against the defendant Farr, Whitlock & Co. which, as will be shown hereafter, is *moot*.

[fol. 69] Thus, the complaint alleges that the purpose of the action is to restrain the enforcement, operation and execution of § 977-b of the New York Civil Practice Act, by restraining the defendant Sabbatino from enforcing execution of said statute on the ground that it is repugnant to the Constitution of the United States. Hence, that a Three Judge Court is required to be convened.

It then alleges that the defendant Sabbatino was appointed Temporary Receiver of the assets in New York of Compania Azucarera Vertientes-Camaguey De Cuba (hereinafter called the "Sugar Company"), by order of the New York Supreme Court, Kings County, on August 16, 1960.

That the individual defendants are co-partners doing business in the name of Farr, Whitlock & Co., as commodity brokers in the City, County and State of New York.

That Farr, Whitlock & Co. has in its possession $175,250.69, the proceeds of a sugar shipment received by it for the account of the plaintiff, which Farr, Whitlock & Co. refused to pay over to Societe Generale, plaintiff's New York agent, because it was advised of the appointment of a Receiver by the Supreme Court, Kings County, for the Sugar Company, which claimed to be the owner of said proceeds and of the sugar shipment.

That the defendant Sabbatino, as such Receiver, "claims the right to take possession of the said sum of $175,250.69," and has, since the institution of this action, procured an order of the Supreme Court of Kings County, directing him to take possession of said sum; and that the "defendant Farr, Whitlock has since paid over such sum to said Receiver."

[fol. 70] That the present government of the Republic of Cuba was recognized by the President of the United States, on or about January 7, 1959, and no act of the government of Cuba, as to property within its jurisdiction, may be impeached or questioned by the courts of the United States.

That § 977-b of the New York Civil Practice Act is unconstitutional in that: (a) it violates the Constitution of the United States, which gives the President sole and exclusive power to conduct foreign relations; (b) it deprives plaintiff of its property in violation of the due process clause of the Fourteenth Amendment; and (c) it places a burden upon commerce in violation of Article I, Section 5, Clause 3.

5. The complaint, as amended, then demands judgment as follows:

"1. Judgment against defendant Farr, Whitlock in the sum of $175,250.69, together with interest;

2. Judgment declaring that § 977-b of the Civil Practice Act of New York as herein applied or sought to be applied is in violation of the Constitution, Laws and Treaties of the United States;

3. Judgment enjoining the defendant Sabbatino and all persons acting on his behalf from enforcing or exercising any powers pursuant to § 977-b of the Civil Practice Act which would impeach or challenge the authority of the Republic of Cuba to nationalize property within its jurisdiction and more particularly enjoining the said defendant Sabbatino from holding or retaining or exercising any jurisdiction over the aforesaid sum of $175,250.69 heretofore paid to him as herein alleged."

[fol. 71] 6. That the relief requested above has become moot and is not within the power or jurisdiction of this Federal Court to grant, is readily apparent from the following proceedings which have occurred in the receivership action pending in the Supreme Court of the State of New York, County of Kings.

7. On August 16, 1960, the Supreme Court of the State of New York, County of Kings, entered an order (a copy of which is annexed to the cross-motion filed herein, by the Temporary Receiver, Peter L. F. Sabbatino) which order appointed Sabbatino, under § 977-b of the New York Civil Practice Act, as Temporary Receiver of the New York assets of the Sugar Company. So far as material, that order directed as follows:

> "Ordered, that Peter L. F. Sabbatino of No. 233 Broadway, New York, be and he hereby is appointed temporary receiver pending the determination of this action, and the said receiver is hereby directed to take, receive and reduce to his possession any and all assets, property, credits and choses in action, tangible or intangible, within the State of New York, and hold the same until the further order of this Court, and it is further
>
> Ordered, that the said temporary receiver shall have all the powers and duties in accordance with those herein provided for as are possessed by and conferred upon receivers and trustees by the laws of the State of New York, . . . "

8. Thereafter, on September 29, 1960, the Temporary Receiver examined Farr, Whitlock & Co., by its partner, Emmet Whitlock. He ascertained from said examination that the partnership was holding $175,250.69, the proceeds of a shipment of 22,175 bags of Cuban raw sugar, to which [fol. 72] proceeds the Sugar Company claimed title upon the ground that said sugar had been manufactured by its mills in Cuba.

At the close of said examination, the attorney for the Temporary Receiver demanded that Farr, Whitlock & Co. pay over to the Receiver said $175,250.69, but Farr, Whitlock & Co. refused to do so.

9. Thereafter, the Temporary Receiver moved, by an order to show cause dated October 4, 1960, and returnable October 11, 1960, at 10 A. M., before the Supreme Court of the State of New York, Kings County, for an order

directing Farr, Whitlock & Co. forthwith to turn over, deliver, and transfer to the Temporary Receiver, any and all moneys held by Farr, Whitlock & Co. for account of the defendant Sugar Company.

In the moving affidavit of the attorney for the Temporary Receiver, the New York Court was specifically requested to direct Farr, Whitlock & Co. forthwith to turn over, deliver, and transfer to the Temporary Receiver said sum of $175,250.69, less such sum for commissions claimed by Farr, Whitlock & Co. to be due it on the transactions involving the purchase and shipment of the sugar as the Court might allow in its order.

10. That motion was argued before the New York Court on October 11, 1960, and it was *granted* on October 14, 1960, by Mr. Justice Cone. The opinion of Mr. Justice Cone, granting said motion, was printed in the New York Law Journal on October 18, 1960, and a copy thereof is annexed as *Exhibit 1.*

11. On October 24, 1960, Mr. Justice Cone signed the order, a copy of which is annexed hereto and made a part hereof, and on October 26, 1960 Farr, Whitlock & Co., in compliance with the order, paid to the Temporary Receiver the sum of $173,936.31.

[fol. 73] 12. It is perfectly clear that the fund of $175,250.69, which the plaintiff in this action seeks to recover from Farr, Whitlock & Co. is already in the possession of the Temporary Receiver under the jurisdiction of the New York State Court. Even as to the sum of $1,314.38 retained by the defendant Farr, Whitlock & Co. pursuant to the order of the New York Court, that Court must be said to have retained jurisdiction of this sum since the Court has only made a prima facie determination of the amount of the commissions and the right of Farr, Whitlock & Co. to receive such commissions, and final determination of these questions must await the final determination of all the claims against the entire sum of $175,250.69 representing the proceeds of the sale of the sugar which will be ultimately payable to the person who the New York Court shall determine was the owner of the sugar shipment and entitled to the proceeds of the sale at the time that Farr, Whitlock & Co. received said

proceeds of the sale thereof. This Court, therefore, has no jurisdiction to entertain any action or proceeding with respect to said fund or to interfere with it in any way, and the present action is moot.

13. The general rule, which was sustained and applied to a claim of the United States, is stated in the first two Headnotes to the opinion of the Supreme Court of the United States in *United States* v. *Bank of New York & Trust Co.*, 296 U. S. 463 (1936), aff'd 77 F. 2d 866 (2d Cir. 1935), as follows:

> "1. The court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of other courts.
>
> 2. This principle governs the state and federal courts and is so applied by this Court as to insure harmony and cooperation between them."

[fol. 74] 14. Consequently, it is submitted that the complaint must be dismissed and the motion brought on by plaintiff's order to show cause should be denied, because the property in controversy, namely, the fund of $175,250.69 proceeds of a sugar shipment, is now within the possession and jurisdiction of the New York State Court, and this Federal Court cannot entertain any action brought by any plaintiff claiming title to such property. Any claim, such as the plaintiff's here, to title to said funds, must, therefore, be relegated to the receivership proceedings pending in the New York Supreme Court, Kings County.

15. This is clear from *United States* v. *Bank of New York & Trust Co., supra.* In that case the United States brought action in the Southern District of New York, to recover certain sums of money, held by the defendant New York bank pursuant to the order of the New York Courts, entered in a proceeding in which the assets of certain Russian insurance companies were being liquidated by the New York Superintendent of Insurance, for the benefit of stockholders and creditors.

The United States sued in the Federal Court to recover said funds, upon the theory that title to the funds belonged

to the United States: because the Russian insurance companies had been nationalized by the Soviet government, which had succeeded to title to said funds, and that the Soviet government had specifically assigned its title to the United States, under the agreement entered into between the United States and the Soviet Union, when the latter was recognized by the United States in November 1933.

The Federal Court, however, on motion, dismissed the action brought by the United States upon the ground that the funds in controversy *were under the jurisdiction of the New York Court;* that the Federal Court could not, therefore, interefere with the property in the jurisdiction of the New York Court; and that the United States must assert its [fol. 75] claim of title to the funds, not in the Federal Court, but in the New York Court which had jurisdiction of the property.

The same thing is true here, and the present complaint should be dismissed and plaintiff's motion denied. Certainly, Cuba can expect no better treatment with respect to its claim in the present action than the United States received in the *Bank of New York* case, *supra.*

Wherefore, it is respectfully submitted, that the complaint should be dismissed as against the defendant, Farr, Whitlock & Co.

Winthrop S. Emmet.

(Sworn to November 8, 1960.)

EXHIBIT 1, ANNEXED TO AFFIDAVIT OF WINTHROP S. EMMET

Same as Exhibit B, Annexed to Affidavit of Emmet Whitlock, printed at pages 79 and 80.

EXHIBIT 2, ANNEXED TO AFFIDAVIT OF WINTHROP S. EMMET

Same as Exhibit C, Annexed to Answer, printed at pages 51 and 52.

[fol. 76]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT OF EMMET WHITLOCK, READ IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

State of New York,
County of New York, ss.:

EMMET WHITLOCK, being duly sworn, deposes and says:

I am a general partner in Farr, Whitlock & Co. (hereinafter "Farr Whitlock"), one of the defendants herein, and am familiar with the facts of this litigation. I make this affidavit in opposition to plaintiff's motion for summary judgment against Farr Whitlock.

Such motion should be denied because there are genuine issues of material fact.

In any event, even if the Court were disposed to find that there are no triable issues, the Court in its discretion should postpone determination of this motion against Farr Whitlock at this time in order to afford Farr Whitlock reasonable opportunity to protect itself from possible double liability and to take steps to have before this Court all proper parties asserting conflicting claims to the funds in question. The funds are claimed by the plaintiff, by Compania Azucarera Vertientes-Camaguey (hereinafter "Vertientes-Camaguey") and by defendant Sabbatino as Civil Practice Act § 977-b Temporary Receiver of the New York assets of Vertientes-Camaguey. Vertientes-Camaguey has sought to vacate the appointment of a Temporary Receiver for its property, and an early trial is likely in Supreme Court, Kings County, of the issue of whether a Receiver should be appointed. Should the Receivership be vacated, Farr Whitlock should have an opportunity, before determi-
[fol. 77] nation of any motion for summary judgment against it, to bring Vertientes-Camaguey into this action and require it to assert its conflicting claim to the funds. Should the Receivership be maintained, and should this Court grant the Receiver's motion, returnable concurrently herewith, to dismiss the complaint against him for plaintiff's failure

to obtain leave of Supreme Court, Kings County to sue the Receiver, Farr Whitlock should have reasonable opportunity, before determination of a motion for summary judgment against it, to ask leave of Supreme Court, Kings County to bring the Receiver into this action and respond to Farr Whitlock's claim that if judgment should be rendered against Farr Whitlock, then Farr Whitlock should have judgment over against the Receiver who presently has custody of the funds in question.

Farr Whitlock is in the position of a stakeholder. It sold certain Cuban sugar for $175,250.69. Plaintiff demands such funds, claiming that by virtue of a Cuban nationalization decree on August 6, 1960 it became the owner of the sugar and thereafter sold the sugar under an agreement whereby Farr Whitlock was to make payment therefor. The defendant Receiver demands such funds in the right of Vertientes-Camaguey, claiming that Vertientes-Camaguey owned the sugar. Vertientes-Camaguey also claims ownership in its own right and contests the appointment under § 977-b of the Receiver of its property. Farr Whitlock acknowledges that it is obligated to pay $175,250.69 (less charges for services performed by it) to the former true owner of the sugar. Farr Whitlock would have held the funds in dispute pending determination by a Court as to the proper party entitled thereto. However, the Receiver procured an order (a copy of which is annexed hereto as Exhibit "A") dated October 24, 1960, of Supreme Court of the State of New York, Kings County, directing Farr Whitlock to make summary turnover of such funds to the Receiver, pending a trial, and Farr Whitlock has [fol. 78] obeyed such order and turned the funds over to the Receiver. Farr Whitlock has appealed from such order.

I am advised by counsel that the following is a time-table of certain steps in this litigation and in a related case "Schwartz v. Compania Azucarera Vertientes-Camaguey De Cuba" pending in Supreme Court, Kings County, an action by a stockholder of Vertientes-Camaguey for the appointment under § 977-b of the New York Civil Practice Act of a Receiver of New York assets of Vertientes-Camaguey, and in which the defendant Peter L. F. Sabbatino has been appointed Temporary Receiver.

August 16, 1960 —Schwartz action instituted in Supreme Court, Kings County. Mr. Sabbatino appointed § 977-b Receiver of Vertientes-Camaguey.

September 16, 1960 —Supreme Court, Kings County denies motion of Vertientes-Camaguey to vacate § 977-b Receivership.

October 4, 1960 —Receiver serves motion in Kings County action to compel Farr Whitlock to make summary turnover to Receiver of sugar proceeds.

October 14, 1960 —Plaintiff serves complaint herein against Farr Whitlock.

October 14, 1960 —Supreme Court, Kings County hands down opinion that Farr Whitlock must summarily turn over sugar proceeds, less permitted commissions, to Receiver, stating this is subject "to the establishment of true ownership, which can only be determined by the Court after trial" (copy of opinion annexed hereto as Exhibit "B").

[fol. 79]

October 17, 1960 —Receiver serves motion herein to dismiss complaint against him for failure to first obtain leave of Supreme Court, Kings County, to sue him.

October 24, 1960 —Supreme Court, Kings County enters order directing Farr Whitlock to summarily turn over $175,250.69 to Receiver, less permitted commissions.

October 26, 1960 —Farr Whitlock turns over $173,936.31 to Receiver in obedience to aforesaid order.

October 31, 1960 —Plaintiff serves amendment to complaint herein.

October 31, 1960 —Plaintiff serves motion for summary judgment, returnable November 10th (adjourned to December 6, 1960).

November 9, 1960 —Farr Whitlock serves motion to dismiss complaint for lack of jurisdiction over subject matter.

November 14, 1960 —Appellate Division, Second Department, affirms order denying motion of Vertientes-Camaguey to vacate Receivership.

November 18, 1960 —Farr Whitlock serves answer herein.

November 25, 1960 —Farr Whitlock serves motion for summary judgment herein against Receiver in event Court grants plaintiff's motion for summary judgment against Farr Whitlock.

[fol. 80] There Exist Genuine Issues of Fact

The amended complaint alleges in substance that plaintiff is financial agent for the Cuban Republic and is a Cuban bank, the majority of stock of which is owned by the Cuban government, that on August 6, 1960 the Cuban government by decree nationalized the property of a number of corporations including Vertientes-Camaguey, that "on or about August 9, 1960" the Cuban government, acting through Banco Para El Comercio Exterior De Cuba (hereinafter "Banco Exterior"), a corporation wholly owned by the Cuban government, sold a quantity of sugar and shipped the same to a principal of Farr Whitlock under an agreement by which Farr Whitlock was to pay for such shipment of sugar upon presentation of drafts and bills of lading, that thereafter Banco Exterior assigned its claim for such payment to plaintiff, that on the morning of September 29, 1960 [undoubtedly August 29, 1960 was intended], plain-

tiff's New York agent Societe Generale presented to Farr Whitlock plaintiff's draft for $175,250.69 and bills of lading, that Farr Whitlock advised Societe Generale that it would make payment later in the day after it had an opportunity to inspect the documents, that on the afternoon of September 29, 1960 [August 29, 1960] Farr Whitlock advised Societe Generale that it had disposed of the documents and received payment therefor but would not pay the money over because of advice of the appointment of a Receiver of the assets of Vertientes-Camaguey which claimed to be the owner of the sugar, that the action of Farr Whitlock constituted a conversion of the bills of lading and fund of $175,250.69, received by it, that the Receiver procured an order from Supreme Court of the State of New York, Kings County, directing him to take possession of the $175,250.69 and that Farr Whitlock paid the money to the Receiver, that the President of the United States has recognized the present government of Cuba and that Civil Practice Act [fol. 81] § 977-b is unconstitutional. Plaintiff asks judgment against both Farr Whitlock and the Receiver for $175,250.69.

The answer of Farr Whitlock admits entering into agreements with Banco Exterior with respect to the sugar in question, the receipt by Farr Whitlock on the morning of August 29, 1960 of the bills of lading and draft, its negotiating the bills of lading and receiving the purchase price on said day. By way of defense Farr Whitlock's answer alleges (a) a § 977-b Receiver of the New York assets of Vertientes-Camaguey, which claimed ownership of the sugar, was appointed on August 16, 1960, and on the afternoon of August 29, 1960, after Farr Whitlock received the proceeds of the sugar, Farr Whitlock was served with an order of a Justice of Supreme Court, Kings County, enjoining Farr Whitlock from taking any action which might result in the removal from New York of any property claimed by Vertientes-Camaguey, and on October 26, 1960 Farr Whitlock made summary payment of the sugar proceeds, less permitted commissions, to the Receiver, in obedience to an order of Supreme Court, Kings County, requiring such payment, and (b) if Vertientes-Camaguey owned the sugar, then plaintiff had no cause of action

against Farr Whitlock. Farr Whitlock's answer also contains (a) a claim over against the Receiver that in the event of adverse judgment against Farr Whitlock the Receiver is liable to Farr Whitlock for the funds heretofore paid to the Receiver pursuant to the aforesaid Court order, and (b) a counterclaim against plaintiff seeking a declaratory judgment against plaintiff for possible unjust enrichment in connection with moneys paid by Farr Whitlock to plaintiff in a different sugar transaction.

I am advised by counsel that determination of Cuban law involves a question of fact. There are genuine issues of fact with respect to Cuban law as applied to the sugar in question. Mr. Rabinowitz' moving affidavit does not give the text of the confiscatory statute in question. He simply refers to an affidavit of Raul Lopez Gonzales which states [fol. 82] that Mr. Gonzales is a Cuban lawyer resident in Havana and the attorney for the plaintiff. The Gonzales affidavit, page 2 refers to a "nationalizing resolution" and annexes as an exhibit an extract from an English translation of a document entitled "Executive Power Resolution No. 1", dated August 6, 1960. Nowhere in the moving papers is the full text of the "nationalizing resolution" set forth, either in Spanish or in English. Moreover, the extract from the Resolution (Gonzales affidavit, Exhibit 1) states that it is in pursuance of powers under "provisions of Law No. 851, of July 6, 1960." Nowhere is the text of Law No. 851 set forth in the moving papers. By diplomatic notes to the Cuban government, the Executive Branch of the United States Government, through its Department of State made "indignant protest" against the Cuban resolution of August 6, 1960 and branded the Cuban law of July 6, 1960 (referred to in the resolution of August 6, 1960) as "manifestly in violation" of accepted "principles of international law" and as "discriminatory, arbitrary and confiscatory" (see Exhibits "C" and "D" hereto).

It is questionable from the moving papers whether and to what extent the Cuban statutes were intended to affect the particular sugar in question, as shown by the following.

Farr Whitlock did not, as stated in Mr. Rabinowitz' moving affidavit (bottom page 2, top page 3), enter into the contracts with Banco Exterior "On February 5, 1960

and July 13, 1960". The contracts (copies of which are annexed hereto as Exhibit "E") with such bank were dated February 5, 1960 and July 13, 1960. Actually, the contracts were entered into about August 11, 1960 after the Cuban nationalization decree of August 6, 1960 referred to by Mr. Rabinowitz (affidavit, page 3).

About February 5, 1960 and about July 13, 1960 Farr Whitlock did in fact enter into contracts for the purchase of sugar. These contracts, copies of which are annexed hereto [fol. 83] as Exhibit "F", were made by Farr Whitlock with General Sugar Estates, Inc., a Cuban corporation and, on information and belief, a wholly owned subsidiary of Vertientes-Camaguey. The contract of February 5, 1960 was for 11,000 tons of sugar at a specified price free alongside steamer, shipment to be made by steamer to be assigned by Buyer to load during May/June 1960, at Santa Maria (Jucaro) Cuba. The contract of July 13, 1960 was for about 26,000 bags of sugar, at a specified price free alongside steamer, shipment to be made by steamer to be assigned by Buyer to load during August 1960 at Santa Maria (Jucaro) Cuba.

A considerable quantity of the sugar relating to these two contracts between Farr Whitlock and Vertientes-Camaguey was shipped and is not the subject of the present complaint. What is involved in the complaint is a portion of the sugar, namely, about 5,122 bags relating to the February 5, 1960 contract and about 17,054 bags relating to the July 13, 1960 contract.

Under normal procedures the sugar in question would have been brought from the Vertientes-Camaguey mill to the harbor at Santa Maria (Jucaro) Cuba. As appears in the affidavit of my partner, F. Shelton Farr, attached hereto, in such harbor there is no pier from which sugar is loaded directly to a ship, and the normal procedure is for sugar to be taken from land by barge or lighter to the ocean-going freighter which may receive the sugar as much as four or six miles off the shore at sea. The sugar in question was loaded on the S. S. Hornfels which is, on information and belief, a German vessel. Loading of the 5,122 bags and 17,054 bags in question began at 6 A. M. on August 6, 1960, the date of the nationalization decree on

which plaintiff relies, and continued until August 9, 1960. This appears from the report (a copy of which is annexed hereto as Exhibit "G") of the ship's master stating that loading was begun at 6 A. M. on August 6, 1960, on which [fol. 84] day (a Saturday) a total of 4,031 bags were loaded, and that 9,347 bags were loaded on August 8, 1960 and 8,797 bags were loaded on August 9, 1960.

I do not know whether or not the Hornfels was more than three miles at sea when this particular sugar was loaded on to it. This would appear to be a material question of fact to be ascertained. If the ship was more than three miles at sea, it is questionable whether the Cuban law intended to expropriate the sugar, or even if such law intended to expropriate it, whether as a matter of international law the expropriation could be effective.

Moreover, even if the Hornfels was loaded at sea within the three-mile limit, it is not clear whether the Cuban expropriation laws, by their text or intent, were meant to expropriate a shipment of sugar that was partially aboard a German freighter lying off the coast of Cuba.

Nor is it clear when the Cuban decree became effective. At the end of the translated extract from the decree annexed to the Gonzales affidavit (on which plaintiff relies) there is an ambiguous reference to a "Special Issue" of the Official Gazette of August 6, 1960. I believe that under Cuban law a decree becomes effective on publication in the Official Gazette. The Gonzales affidavit does not say that a "Special Issue" of the Official Gazette was actually published on August 6th, a Saturday. I have inquired of a person living in Cuba at the time who was watching for contents of the Official Gazette and he cannot recollect that any "Special Issue" appeared publicly on Saturday, August 6, 1960.

As a practical matter, ships carrying Cuban sugar could not leave the area once the August 6th decree was passed without Cuban government consent. Plaintiff's moving papers (Rabinowitz affidavit, page 3) erroneously state that the sugar was shipped "on August 9, 1960". Although, as the master's report states, loading of the Hornfels was completed on August 9th, the ship did not sail until sev- [fol. 85] eral days thereafter. Meanwhile, and after the de-

cree of August 6th, the Cuban government offered to release sugar to sugar buyers if the buyers would enter into contracts with a governmental agency, similar to the original contracts. Farr Whitlock had its own commitments to sell the sugar which was the subject of the February 5, 1960 and July 13, 1960 contracts with General Sugar Estates, Inc. and between the time these commitments were entered into and the August 6th decree, a Cuban governmental agency arbitrarily advanced the price of Cuban sugar nearly twenty per cent. Hence, to get the sugar and fulfill its own commitments Farr Whitlock, on about August 11, 1960, signed two contracts (copies annexed hereto as Exhibit "E") with Banco Exterior, the agency of the Cuban government; covering the sugar which had been loaded on the Hornfels. These contracts were identical in price and terms with the original contracts signed with Vertientes-Camaguey on February 5th and July 13th and the original dates of February 5th and July 13th were typed on the new contracts. In this way the ship was permitted to leave and the sugar delivered to Farr Whitlock's customer.

On Friday, August 26, 1960, Societe Generale, purporting to act for Banco Exterior, voluntarily delivered to Farr Whitlock bills of lading relating to the sugar in question. Farr Whitlock returned these bills of lading to Societe Generale on the ground that they were technically defective. On the same day Farr Whitlock entered into an agreement with Vertientes-Camaguey (a copy is annexed as Exhibit "2" to the Wilson affidavit referred to on page 4 of the Rabinowitz affidavit) whereunder Farr Whitlock agreed that if it received the sugar proceeds it would hold them pending a Court order as to disposition thereof, whereunder Vertientes-Camaguey agreed that if it received the sugar proceeds it would hold them in escrow, and whereunder Farr Whitlock was to receive 10% of the sugar pro-
[fol. 86] ceeds provided that Vertientes-Camaguey should finally obtain clear title to the funds.

On Monday morning, August 29, 1960, Societe Generale voluntarily re-delivered to Farr Whitlock a draft and bills of lading relating to the sugar. Thereafter, and on that day, Farr Whitlock negotiated the bills of lading to its cus-

tomer in New York City and received the purchase price therefor. About 5 P. M. that same afternoon, and after receipt of the sugar proceeds, Farr Whitlock was served with an order of Hon. Lewis W. Oliffe, a Justice of the Supreme Court, Kings County, enjoining Farr Whitlock from taking any action which might result in removal from New York of assets claimed by Vertientes-Camaguey. Thereupon, by letter dated August 29, 1960 (a copy of which is annexed hereto as Exhibit "H"), Farr Whitlock advised Societe Generale that Farr, Whitlock & Co. had received formal notification of the appointment of a Receiver for Vertientes-Camaguey, that Vertientes-Camaguey claimed to be the owner of the sugar, that the aforesaid restraining order of the Kings County Court had been served, and that under the circumstances, Farr, Whitlock & Co. felt obliged to retain the proceeds until a Court of competent jurisdiction shall have determined who has title to the sugar.

I believe Mr. Rabinowitz is in error when he says (his affidavit, page 5) that on August 29, 1960 a Farr Whitlock representative promised payment of the draft to a Societe Generale representative. Mr. Rabinowitz states that at 10 A. M. on August 29, 1960, Societe Generale presented the bill of lading and draft to Farr Whitlock for payment. Mr. Rabinowitz then quotes, as the only basis for the alleged promise of payment, the following from an affidavit of Henri Blanchenay, the Manager of the Societe Generale office:

> [fol. 87] "The representative of Societe Generale was told by the Farr, Whitlock & Co. representative that the latter wished to examine the documents to see that they conformed with the specifications of the contract and asked that the former return at 3:00 P. M., at which time Farr, Whitlock & Co. would make payment of the $175,250.26 if the documents were found to be in order."

Mr. Blanchenay does not identify either the Farr Whitlock representative who was supposed to have made the promise of payment, or the Societe Generale representative to whom such promise was made.

I have asked my partners and employees of Farr Whitlock about any conversations with the Societe Generale representative who presented the draft to Farr Whitlock. I did not, and I am advised that none of my partners or any Farr Whitlock employee did, have any conversation with any Societe Generale representative about payment of the draft when it was delivered. I believe that the draft and bills of lading were delivered in the usual manner by ordinary messenger and that no conversation with the messenger as to payment of the draft took place.

The epithets ("deliberate fraud"—"dishonest"), in the Rabinowitz affidavit (page 6) come with ill grace. This entire litigation and the various conflicting claims stem from confiscatory decree of the Cuban government, which, according to the complaint herein, owns all the stock of plaintiff's assignor. Farr Whitlock had the right to protect itself. It was possible that as a matter of law the sugar in question was never taken over by the Cuban government under the August 6th decree. Farr Whitlock has obviously never sought to pocket the $175,250.69 and would have held on to such sum pending a determination of the conflicting claims of others thereto, were it not for the mandatory order of Supreme Court, Kings County to turn the money over to the Receiver.

[fol. 88] Should the Court Deny Farr Whitlock's Motion to Dismiss, the Court in its Discretion Should not Grant Summary Judgment Against Farr, Whitlock Without Having All Interested Parties Before the Court and Requiring Them to Adjudicate Their Conflicting Claims in This Action.

One shipment of sugar is involved. One purchase price has been received. Only one of the rival claimants is entitled to the purchase price. Farr Whitlock should not be subjected now to a claim for summary judgment by plaintiff, and later to a similar claim by Vertientes-Camaguey or its Receiver. Before summary judgment is awarded, all proper parties should be before the Court so that the true owner of the sugar entitled to the proceeds thereof can be determined in one action.

In an opinion (a copy is annexed hereto as Exhibit "I") handed down on November 14, 1960, the Appellate Division, Second Department, affirmed an order denying the motion of Vertientes-Camaguey to vacate the Receivership. It is likely that there will be an early trial of the issue of whether the Receivership of Vertientes-Camaguey should be vacated, since the opinion points out that Vertientes-Camaguey "would be entitled to an order setting the case down for trial on a day certain, as a preferred cause". Should the Receivership be vacated, Farr Whitlock should, before determination of summary judgment against it, have an opportunity to bring Vertientes-Camaguey into this action to assert its claim to the funds in question.

Should the Receivership be maintained, and should this Court grant the Receiver's present motion to dismiss the complaint herein against him for plaintiff's failure to obtain leave of the Kings County Court to sue the Receiver, Farr Whitlock should be given an opportunity, before determination of summary judgment against it, to ask leave of the Kings County Court to assert against the Receiver [fol. 89] in this action a claim for judgment over against the Receiver in this action in the event of an adverse judgment against Farr Whitlock. Farr Whitlock should not be penalized for obeying the order of Kings County Court to make summary payment of the funds to the Receiver pending a trial as to who is entitled to the funds.

Finally, I am advised by counsel that there are complicated questions of foreign law which should not be decided without a trial and on the basis of the inadequate record before this Court, and that the issue raised by plaintiff of the unconstitutionality of § 977-b should not be decided on an inadequate record.

The law with respect to these matters will be discussed in a memorandum of law which will be separately furnished.

It is respectfully submitted that plaintiff's motion for summary judgment against Farr Whitlock should be denied.

Emmet Whitlock.

(Sworn to November 23, 1960.)

[fol. 90]

EXHIBIT A, ANNEXED TO AFFIDAVIT OF EMMET WHITLOCK

Same as Exhibit C, Annexed to Answer, printed at pages 51 and 52 of the record.

EXHIBIT B, ANNEXED TO AFFIDAVIT OF EMMET WHITLOCK

New York Law Journal, Tuesday, October 18, 1960, Volume 144—No. 75, Page 16. Supreme Court, Kings County, Special Term, Part I. By Mr. Justice Cone.

Schwartz v. Compania Azucarera Vertientes-Camaguey —Application by the receiver appointed by this court directing Farr, Whitlock & Co. to turn over and transfer to him the moneys held by such company. The receiver was appointed pursuant to section 977-b of the Civil Practice Act. Subdivision 19 thereof specifically states that the title to all the assets, credits and property belonging to the defendant or to *which it may be entitled* shall immediately vest in the receiver. Subdivision 20 further provides that any receiver appointed pursuant to the aforesaid section shall be deemed to have obtained possession of all the assets, credits, choses in action and property, upon the service of a copy of the order appointing such receiver upon the person or firm holding the same. Under the circumstances, the receiver was entitled to such assets immediately upon the service of the order on the above named company. It is interesting to note that the application of the defendant to vacate the appointment of the receiver was denied by Mr. Justice Schwartzwald (N. Y. L. J., September 8, 1960, p. 12, col. 7). The court, under the circumstances, is bound by the decision of Mr. Justice Schwartzwald in sustaining the receivership. The claim by the defendant and the others that the funds involved be retained by the present holder until the Appellate Division passes upon the decision of Mr. Justice Schwartzwald is of no weight, as such application should have been [fol. 91] made to the appellate court and not in this proceeding. As to the question of title to the funds, it may well be

that the Cuban Government acquired title to the same through nationalization. However, this acquisition under such circumstances is opposed by the defendant and by the receiver, who has title to the property of the defendant in the State of New York pursuant to section 977-b, subdivision 19, of the Civil Practice Act, subject of course, to the establishment of true ownership, which can only be determined by the court after trial. In any event, our courts have held that nationalization decrees of foreign governments are repugnant to the public policy of the State of New York (Vladikan Kazsky Ry. v. N. Y. Trust Co., 263 N. Y. 369; Bollack v. Societe Generale, Pour, &C., 263 App. Div. 601; Augstein v. Banska A. Hutni Akciova Spolecnost, 124 N. Y. S. 2d 440, modified on other grounds 125 N. Y. S. 2d 647). While the assets of the defendant may have been "nationalized" the courts of this state deny any validity to effect such nationalization as to the assets within the State of New York (see Bollack v. Societe Generale Pour, &c., supra). Accordingly, the motion is granted. The funds are to be deposited with the Kings County Trust Company to be held by it subject to the further order of the court and not to be withdrawn except on such order. This disposition obviates the necessity of the receiver filing an additional bond and charging the estate with the premium. The order shall further provide for the payment to Farr, Whitlock & Company of the sums rightfully due it for commissions, &c. Settle order on notice.

EXHIBITS C AND D, ANNEXED TO AFFIDAVIT OF EMMET WHITLOCK

Same as Exhibits A and B, annexed to Exhibit D to Answer of defendants, printed at pages 57 to 59 of the record.

[fols. 92-93]

EXHIBIT E, ANNEXED TO AFFIDAVIT OF EMMET WHITLOCK

(See opposite) ☞

FARR, WHITLOCK & CO.

COPY

(1) Quantity.

(2) Price.

(3) Shipment.

(4) Loading.

(5) Weighing.

(6) Deductions Allowed.

(7) Payment.

(8) Condemned.

(9) Insurance.

(10) Shortened Sea Risk Insurance.

(11) Force Majeure.

(12) Transfers.

(13) Penalty.

(14) Arbitration.

BROKERAGE

ACCEPTED

SELLERS

ACCEPTED / FARR WHITLOCK & CO.

BUYERS

Exhibit E

FARR, WHITLOCK & CO.

120 WALL STREET
NEW YORK

F.A.R. — CUBA

FOR COUNTRIES OTHER THAN THE UNITED STATES

CONTRACT NO. [redacted]
BOUGHT No. 320

New York July 13, 1960

COPY

TO BANCO PARA EL COMERCIO EXTERIOR DE CUBA
CALLE 13 NO. 171 VEDADO
HAVANA CUBA

WE HAVE THIS DAY PURCHASED FOR YOU FOR ACCOUNT OF CUBA/LIBRE

(1) Quantity. About 13,000 Tons, 5% about 1000 Tons

tons (Ton equal to 2,240 lbs. net) of Cuban Centrifugal Sugar, fair average quality of the crop of the year 19[redacted] for shipment to countries other than the United States. Shipment of this sugar is approved by Export-Import Bank of Washington.

Sugar shall be shipped in new [redacted] bags of the country size, [redacted] shipment to weigh approximately [redacted] bags per ton.

(2) Price. At a price of [redacted] per lb. U. S. currency, basis 96° free alongside steamer

(3) Shipment. Shipment to be made by steamer/s to be assigned by Buyer to load during August 1960 at one safe port [redacted] Cuban Ports for each steamer, further loading to be continuous, unless otherwise agreed between Buyer and Seller, from [redacted] Cuba.

(4) Loading. Buyer to give Seller reasonable notice of expected readiness to load, and thereafter further advice as to date of loading. Buyer to nominate sugar on and as profitable and Seller is to supply cargo to vessel according to Charter Party terms as agreed between Buyer and Seller. However, it is mutually agreed between Buyer and Seller that the loading rate, per weather working day of eight (8) hours (Sundays, Mondays afternoons, and holidays excepted) is to be [redacted] tons per day, [redacted] Cuban Ports and Casilda, and 3,000 bags of about 325 lbs. each per [redacted] Cuban Ports except Casilda, in default of which demurrage is to be paid by Seller at Charter party rate. Should the sugar be delivered faster than the above rate, despatch earned at Charter Party rate to be for account and benefit of Seller. Captain to endeavour at the next loading period according to custom of the port after Captain reports ship ready to receive cargo whether in berth or not. Despatch to be paid in United States current funds.

(5) Discharging. Net landed weights and usual conditions of Sampling and Polarizing at port of discharge.

(6) Polarization Allowances. Basis 96° average outturn polarization Allowances for test deviations to be as set out overleaf. If sugar is shipped to the United Kingdom or Canada possibly duty on sugar testing in excess of 96° to be Seller's account.

(7) Payment. To be made in New York, in New York current funds by net cash, on presentation of customary shipping documents for 90 per cent. of the provisional invoice amount to Seller by Buyer. Balance to be paid promptly after final settlement of weights and tests.

(8) Settlement. If sugar is shipped to United Kingdom, Eire, Casablanca, Penang, Germany, Belgium, Sweden and/or Holland, settlement to be made on net landed weights and London or other agreed U. K. Polarization of samples taken as part of discharge, duplicate above and below 96° to be calculated on net cost overland. If sugar is shipped to Canada, the usual Canadian polarization conditions to apply, but allowance for degrees above or below 96, to be calculated as net cost overland. If sugars are shipped to countries other than the specified above, settlement shall be made on the basis of net shipping weights and polarizations.

(9) Documents. Buyer to give Seller at once copies of such documents as are required by, and as forms acceptable to the Customs at port of destination, including full details of such Consular Certificates as are required. Seller to have shipping documents ready on shorter forms as soon as shipment is complete, but to be not to be held responsible for any delays owing to absence of, or distant location of Consuls from port of shipment.

(10) Marine and War Risk Insurance. Marine and War Risk Insurance from shore to shore under the usual terms and conditions including craft risk, loading and discharging, and including lighter and craft risk in Cuban ports while waiting arrival of vessel assigned to transport sugars but otherwise not more than seven (7) days prior to the due date of the arrival of vessel to be covered by Buyers for Buyer's account. Certificate of Assurance to be furnished by Buyer if requested by Seller.

(11) Force Majeure. Should delivery in whole or in part be prevented or delayed directly or indirectly by any cause of Force Majeure, War, Strikes, Rebellion, Insurrection, Political Disturbances, Civil Commotion, Fire or any other cause beyond Seller's control, Seller shall advise Buyer by cablegram of such fact and of quantities thereof, and the latter shall have the option of cancelling the contract for the quantities so prevented or delayed, or of taking the sugar at contract price as soon as it can be delivered. This option to be declared to Seller within five (5) working days of receipt of Seller's cablegram.

(12) Taxation. (a) Any taxes or levies in the nature of taxes which may be imposed on this sugar by the country of destination shall be for account of Buyer.
(b) Any taxes or levies in the nature of taxes which may be imposed by the country of origin shall be for the account of Seller.

(13) Penalty. In the event of Buyer failing to provide tonnage by the last date of shipment period of this contract, payment shall be made in cash to Seller or his Agents in New York upon delivery to Buyer or his nominee in New York of documents of title acceptable to Buyer, in which case settlement for said sugar is to be based upon outturn weights and tests of sugar of the same mark delivered at European or Canadian Ports at about the same time. Buyer is also to reimburse Seller for the actual cost and proved loss of holding over the sugar.

(14) Arbitration. Any dispute arising out of this Contract to be settled by arbitration under the Rules of the Sugar Association of London (Cane Sugar Section), Buyer being considered as a Refiner.

BROKERAGE [redacted]

ACCEPTED BANCO PARA EL COMERCIO EXTERIOR DE CUBA — BROKER

[redacted] (SELLER)

ACCEPTED: FARR, WHITLOCK & CO.

[redacted] (BUYER)

[fols. 94-95]

EXHIBIT F, ANNEXED TO AFFIDAVIT OF EMMET WHITLOCK

(See opposite) ☞

FAR., WHITLOCK & CO. re SALE NO. [illegible]

120 WALL STREET
NEW YORK

F.A.S. — CUBA
FOR COUNTRIES OTHER THAN THE UNITED STATES

New York FEBRUARY 2, 1960

TO CENTRAL CUBA SUGARS, INC.
HAVANA, CUBA

WE HAVE THIS DAY PURCHASED FOR THE FOR ACCOUNT OF OURSELVES - - COPY - - -

(1) Quantity. ELEVEN THOUSAND (11,000) . . . . . tons (1 ton equal to 2240 lbs. net) of Cuban Centrifugal Sugar, fair average quality of the crop of the year 1959 and/or 1960 at seller's option, for shipment to countries other than the United States. Shipment of five (5) % per cent. more or less at Buyer's option for chartering purposes only.

It is understood that seller agrees to give Buyer the option to ship this sugar to the United States, in which case the exchange of identity certificate is to be for Buyer's account and Lawton supervision rates to be charged to Seller. Buyer to pay actual cost of supervision in the United States.

Buyer shall be obliged to accept jute bags of the customary size, in all cases where shipment is made in second-hand bags there shall be deducted for each second hand bag of about 200 lbs. net capacity.

(2) Price. At a price of Two and Eleven Five Hundredths (2.11.05) . . . . . cents per U. S. currency, basis 96° test alongside steamer . . . . . .

(3) Shipment. Shipment to be made by steamer/s to be assigned by Buyer to load during . . . . . .

. . . . . .

(4) Loading. Buyer to give Seller reasonable notice of expected readiness to load, and thereupon Seller shall declare port or ports of loading. Steamer to receive sugar as fast as possible, and Seller to be ready cargo to vessel according to Charter Party terms, as agreed between Buyer and Seller. However, it is mutually agreed between Buyer and Seller that the loading rate, per weather working day of eight (8) hours (Sundays, Saturday afternoons, and holidays excepted) is to be [illegible] 1,000 bags of about 250 lbs each net/net/net. Any time lost in excess of the above mentioned 1,000 bags of about 250 lbs each net/net/net allowed for loading to be for account of Seller, and any time saved in excess of the above mentioned 1,000 bags of about 250 lbs each net/net/net allowed for loading to be for account of Buyer. Any demurrage to be paid by Seller at Charter party rate. Should the sugar be delivered faster than the above rate, despatch earned at Charter Party rate to be for account and benefit of Seller. Laytime to commence at the next loading period according to custom of the port after Captain reports ship ready to receive cargo whether in berth or not. Despatch to be paid in United States current funds.

(5) Discharging. Net landed weights and usual conditions of Sampling and Polarizing at port of discharge.

(6) Polarization Allowance. Basis 96° average customs polarization Allowance for test deviation to be as set out over-leaf. If sugar is shipped to the United Kingdom or Canada penalty, duty on sugar landing in excess of 96° to be Seller's account.

(7) Payment. To be made in New York, in New York current funds by net cash, on presentation of customary shipping documents for 90 per cent. of the provisional invoice amount to Seller by Buyer. Balance to be paid promptly after final settlement of weights and tests.

(8) Settlement. If sugar is shipped to United Kingdom, Eire, Czechoslovakia, France, Germany, Belgium, Sweden and/or Holland, settlement to be made on net landed weights and London or other agreed U. K. Polarization of samples taken at port of discharge, degrees above and below 96° to be calculated as set out overleaf. If sugar is shipped to Canada, the usual Canadian polarization conditions to apply, but differences for degrees above or below 96° to be calculated as set out overleaf. If sugars are shipped to countries other than those specified above, settlement shall be made on the basis of net shipping weights and polarizations as per U.S. Department thereof, at Cuban Ports.

(9) Documents. Buyer to give Seller at once copies of such documents as are required by, and are forms acceptable to the Customs at port of destination, including full details of such Consular Certificates as are required. Seller to have shipping documents made out as should forms as soon as shipment is complete, but he is not to be held responsible for any delays owing to absence of, or distant location of Consuls from port of shipment.

(10) Marine and War Risk Insurance. Marine and War Risk Insurance from shore to shore under the usual terms and conditions including such risk, loading and discharging and including lighter and craft risk in Cuban ports while waiting arrival of vessel assigned to transport sugars but excluding port more than seven (7) days prior to the due date of the arrival of vessel to be approved by Buyers for Buyer's account. Certificate of insurance to be furnished by Buyer if requested by Seller.

(11) Force Majeure. Should delivery in whole or in part be prevented or delayed directly or indirectly by any cause of Force Majeure, War, Strikes, Rebellion, Insurrection, Political Disturbances, Civil Commotion, Fire or any other cause beyond Seller's control, Seller shall advise Buyer by cablegram of such fact and of quantities thereof, and the latter shall have the option of cancelling the contract for the quantities so prevented or delayed, or of taking the sugar at convenient ports as soon as it can be delivered. This option to be declared to Seller within five (5) working days of receipt of Seller's cablegram.

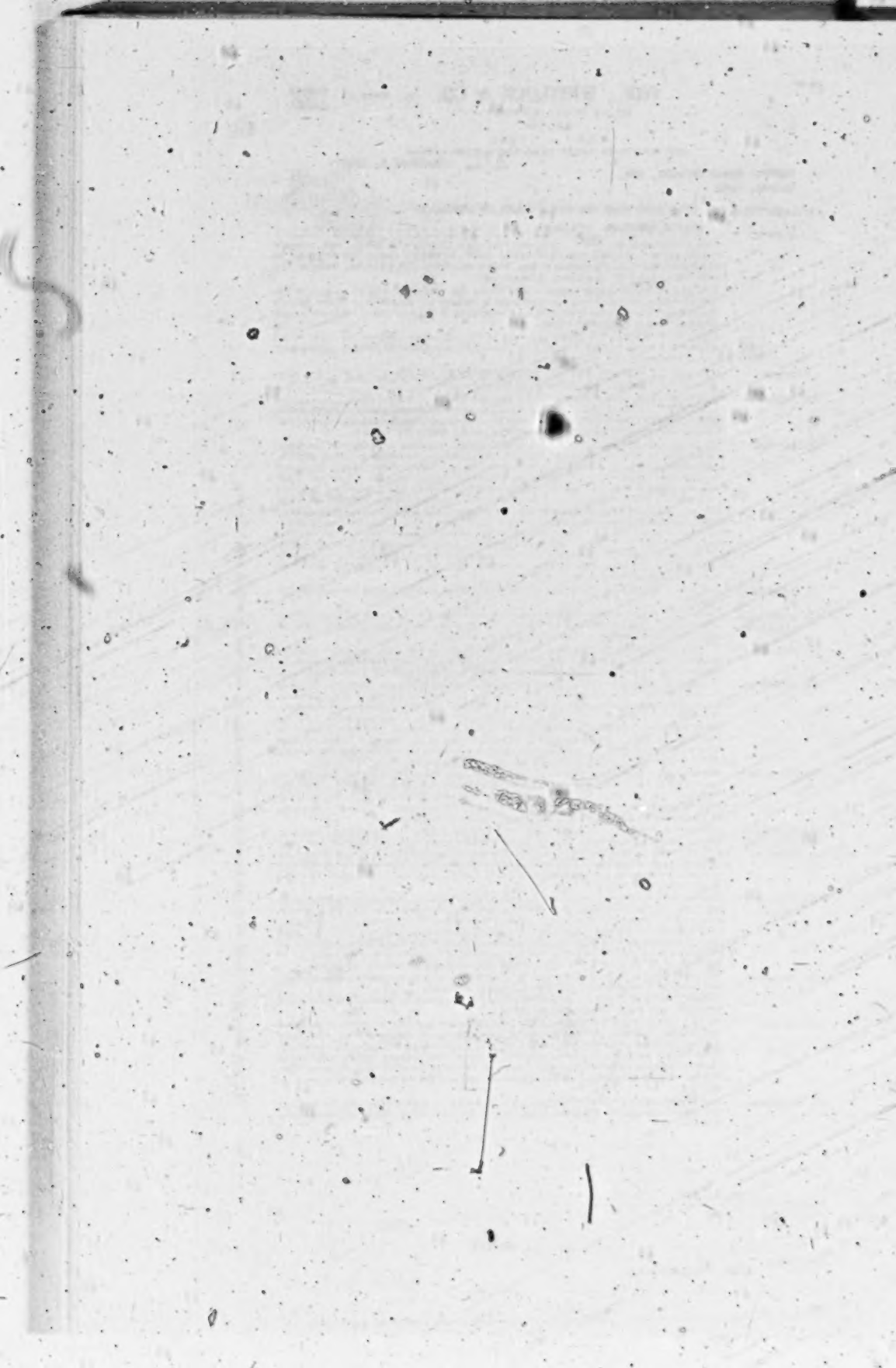
(12) Taxation. (a) Any taxes or levies in the nature of taxes which may be imposed on this sugar by the country of destination shall be for account of Buyer.
(b) Any taxes or levies in the nature of taxes which may be imposed by the country of origin shall be for the account of Seller.

(13) Penalty. In the event of Buyer failing to provide tonnage by the last date of shipment period of this contract, payment shall be made in cash to Seller or his Agents in New York upon delivery to Buyer or his nominee in New York of documents of title convertible to Buyer, in which case settlement for said sugar is to be based upon customs weights and tests of sugar of the same mark delivered at European or Canadian Ports as stated the same time. Buyer is also to reimburse Seller for the actual cost and proved loss of holding over the sugar.

(14) Arbitration. Any dispute arising out of this Contract to be settled by arbitration under the Rules of the Sugar Association of London (Cane Sugar Section), Buyer being considered as a Refiner.

BROKERAGE 3/4 of 1% BROKER
ACCEPTED: _____ (SELLER)
ACCEPTED: FAR, WHITLOCK & CO. _____ (BUYER)

Exhibit F



FARR, WHITLOCK & CO.

CONTRACT NO. [redacted]

120 WALL STREET
NEW YORK

F.A.S. — CUBA
FOR COUNTRIES OTHER THAN THE UNITED STATES

TO [redacted]
[redacted] CUBA

New York July 13, 1960

WE HAVE THIS DAY PURCHASED FOR THE ACCOUNT OF [redacted]

COPY

(1) Quantity. About 30,000 bags, more or less 325#
tons (1 ton equal to 2240 lbs. net) of Cuban Centrifugal Sugar, fair average quality of the crop of the year 1960 [redacted] under shipment to countries other than the United States [redacted]

It is understood that seller agrees to give Buyer the option to ship this sugar to the United States, in which case the exchange of identity certificates is to be for Buyer's account and Cuban supervision costs to be charged to Seller, Buyer to pay actual cost of supervision in the United States.

Buyer shall be shipped in vessel [redacted] bags of the customary size [redacted]

(2) Price. At a price of [redacted] cents per lb. U. S. currency, basis 96° test alongside steamer [redacted]

(3) Shipment. Shipment [redacted] to be assigned by Buyer to load during [redacted] at [redacted] Cuban Ports, [redacted] (Options) Cuba

(4) Loading. Buyer to give Seller reasonable notice of expected readiness to load, [redacted] Steamer to receive sugar as fast as possible, and Seller is to supply cargo to vessel according to Charter Party terms, as agreed between Buyer and Seller. However, it is mutually agreed between Buyer and Seller that the loading rate, per weather working day of eight (8) hours (Sundays, Saturday afternoons, and holidays excepted) is to be [redacted] bags of about 250 lbs. each at Manati, Cuban Ports, except Cienfuegos, and 5,000 bags of about 250 lbs. each at Cienfuegos, Cuban Ports, except Cienfuegos, in default of which demurrage is to be paid by Seller at Charter party rate. Should the sugar be delivered faster than the above rate, despatch earned at Charter Party rate to be for account and benefit of Seller. Laytime to commence at the next loading period according to custom of the port after Captain reports ship ready to receive cargo whether in berth or not. Despatch to be paid in United States current funds.

(5) Discharging. Net landed weights and usual conditions of Sampling and Polarizing at port of discharge.

(6) Polarization Allowances. Basis 96° average outturn polarization. Allowances for test deviation to be as set out over-leaf. If sugar is shipped to the United Kingdom or Canada penalty duty on sugar testing in excess of 98° is for Seller's account.

(7) Payment. To be made in New York, in New York current funds by net cash, on presentation of necessary shipping documents for 98 per cent. of the provisional invoice amount to Seller by Buyer. Balance to be paid promptly after final settlement of weights and tests.

(8) Settlement. If sugar is shipped to United Kingdom, Eire, Casablanca, France, Germany, Belgium, Sweden and/or Holland, settlement to be made on net landed weights and London or other agreed U. K. Polarization of samples taken at port of discharge, degrees above and below 96° to be calculated as set out overleaf. If sugar is shipped to Canada, the usual Canadian polarization conditions to apply, but allowance for degrees above or below 96° to be calculated as set out overleaf. If sugars are shipped to countries other than those specified above, settlement shall be made on the basis of net shipping weights and polarizations. ● Less $1.12 Superintendence Co., already 1/60.

(9) Documents. Buyer to give Seller at once copies of such documents as are required by, and on forms acceptable to the Customs at port of destination, including full details of such Consular Certificates as are required. Seller to have shipping documents made on similar forms as soon as shipment is complete, but he is not to be held responsible for any delays owing to absence of, or distant location of Consuls from port of shipment.

(10) Marine and War Risk Insurance. Marine and War Risk Insurance from shore to shore under the usual terms and conditions including craft risk, landing and discharging and including lighter and craft risk in Cuban ports while waiting arrival of vessel assigned to transport sugars but not touching not more than seven (7) days prior to the due date of the arrival of vessel to be covered by Buyers for Buyer's account. Certificate of Insurance to be furnished by Buyer if requested by Seller.

(11) Force Majeure. Should delivery in whole or in part be prevented or delayed directly or indirectly by any cause of Force Majeure, War, Strikes, Rebellion, Insurrection, Political Disturbances, Civil Commotion, Fire or any other cause beyond Seller's control, Seller shall advise Buyer by cablegram of such fact and of quantities thereof, and the latter shall have the option of cancelling the contract for the quantities so prevented or delayed, or of taking the sugar at contract price on town as it can be delivered. This option to be declared to Seller within five (5) working days of receipt of Seller's cablegram.

(12) Taxation. (a) Any taxes or levies in the nature of taxes which may be imposed on this sugar by the country of destination shall be for account of Buyer.
(b) Any taxes or levies in the nature of taxes which may be imposed by the country of origin shall be for the account of Seller.

(13) Penalty. In the event of Buyer failing to provide tonnage by the last date of shipment period of this contract, payment shall be made in cash to Seller or his Agents in New York upon delivery to Buyer or his nominee in New York of documents of title acceptable to Buyer, in which case settlement for said sugar is to be based upon outturn weights and tests of sugar of the same mark delivered at European or Canadian Ports at about the same time. Buyer is also to reimburse Seller for the actual cost and proved loss of holding over the sugar.

(14) Arbitration. Any dispute arising out of this Contract to be settled by arbitration under the Rules of the Sugar Association of London (Cane Sugar Section), Buyer being considered as a Refiner.

BROKERAGE [redacted]

ACCEPTED: [redacted] — BROKER

ACCEPTED: FARR, WHITLOCK & CO. — (SELLER)

[redacted] — (BUYER)

Exhibit F

[fol. 96]

EXHIBIT G, ANNEXED TO AFFIDAVIT OF EMMET WHITLOCK

(See opposite) ☞

RENÉ VILLA

SUGAR LOADING REPORT

PORT [redacted] S/L [redacted] VOY N°

	DATE	HOUR
ARRIVED AT [redacted] (Pilotage) Cuba ( ) FROM [redacted]	1958, Sept 5th	A.M. 6:05
LAY DAYS BEGAN	" 6 "	6:00
STARTED LOADING	" 6 "	6:00
MOVED TO		
FINISHED LOADING	Sept 9 "	1:00 p.m.
SAILED FOR SAGUA LA GRA, HERRERA, (Río Sagua de Sama, Cuba)	" 22 "	5:00
DRAFT SAILING: FWD 11'10" AFT 26'4" MEAN 18'7"		

DATE 1958	HOUR STARTED	HOUR FINISHED	No. of Bags Loaded	SHIPPER	No. of Hatches Used	No. Of Gangs	Which Hatches Worked	Time Delayed	Reason for Delay
August 6th	6:00 AM	10:00 AM	4,021	Francisco Sugar Refinery, Inc.	3	3	1-2-3-4-5	1 Hr.	Awaiting Preparing, [illegible]
" 7th	[illegible]								
" 8th	6:00 AM	4:00 PM	9,317	" "	4	3	1-2-3-4-5	No time lost	
" 9th	" "	1:00 PM	8,777	" "		3	" " " "	"	"

COPY

The ship had at all times sufficient cargo alongside to load in accordance with Charter Party

[redacted]

TOTAL BAGS 22,115

Bags Sugar 325 Bags Sugar 1958 Crop.

MARKS [redacted] 22,115 Bags

RENE VILLA

REMARKS Ship 614 was sail immediately after completion of loading in accordance with instructions received from Messrs Gelats.

Exhibit C

[fol. 98]

EXHIBIT H, ANNEXED TO AFFIDAVIT OF EMMET WHITLOCK

Same as Exhibit A, annexed to Answer, printed at pages 49 and 50.

EXHIBIT I, ANNEXED TO AFFIDAVIT OF EMMET WHITLOCK

New York Law Journal
November 15, 1960
Vol. 144—No. 93, page 16, Col. 8
APPELLATE DIVISION, SECOND DEPARTMENT

By NOLAN, *P.J.*: KLEINFELD, CHRIST, PETTE and BRENNAN, *J.J.*

Schwartz, res. v. Compania Azucarera Vertientes-Camaguey De Cuba, ap (Sabbatino, res)—In an action by a stockholder pursuant to section 977-b of the Civil Practice Act for the appointment of a receiver of the assets in this state of a foreign (Cuban) corporation, allegedly nationalized by the government of the Republic of Cuba, the defendant foreign corporation appeals from an order of the Supreme Court, Kings County, dated September 14, 1960, which denies its motion for alternative relief, either to vacate an order, dated August 16, 1960, appointing ex parte a temporary receiver of its New York assets or to appoint a temporary receiver of its own choice in place of the receiver previously appointed.

Special Term denied the motion on the ground that the issues presented could be decided only after a trial and that the defendant could obtain an early trial by promptly filing an answer, whereupon it would be entitled to an order setting the case down for trial on a day certain, as a preferred cause (C. P. A., sec. 977-b, subdivision 9).

Order affirmed, without costs.

Although the statute provides that upon an affidavit reciting that personal service of the summons cannot be [fol. 99] effected within the state with due diligence and upon a summons and verified complaint alleging that the defendant is a foreign corporation and alleging other jurisdic-

tional facts including the fact that it has been dissolved, nationalized or that it has ceased to do business, the plaintiff, without notice, may apply for the appointment of a temporary receiver and that the court must thereupon appoint such receiver, in our opinion the court was not required to appoint a temporary receiver upon the bare allegations in the complaint in this action, made on information and belief and without alleging any supporting facts, that the Government of Cuba had nationalized the defendant and confiscated all its assets, and that the defendant had ceased to do business and was in the process of liquidating its assets.

Neither do we consider the averment on information and belief in plaintiff's affidavit on the application for the appointment of the receiver that "the defendant does not do any business within the State of New York, and personal service of the summons cannot therefore be effected within the State of New York with due diligence," which averment was apparently based on the fact that the defendant was not qualified to do business in this state, as a recitation of the facts sufficient to require that a receiver be appointed ex parte.

Although the word "must" as used in the statute (C. P. A., sec. 977-b) was apparently intended to have an imperative meaning (cf., however, Jenkins v. Putnam, 106 N. Y. 272; Matter of Thurber, 162 N. Y. 244; Munro v. State of N. Y., 223 N. Y. 208), we do not believe that it was intended thereby to deprive the court of all discretion to examine the affidavit and pleading submitted and to require proof by affidavit and proper allegations of the facts upon which the stated conclusions are based. We are not prepared to say, however, that the complaint and affidavits [fol. 100] could not have been accepted as sufficient, as they were here, subject to the power of the judge who made the order and the power of the court to vacate it upon disclosure of the facts (cf. C. P. A., sec. 131; Jenkins v. Putnam, supra).

Upon examination of the facts as disclosed by the papers presented on the motion which resulted in the order appealed from, we are of the opinion that there is at least a question which should be determined on trial, as to whether,

within the meaning of the statute (C. P. A., sec. 977-b), the foreign corporate defendant had ceased to do business. The record also discloses that when the temporary receiver was appointed plaintiff had reasonable grounds to believe that service of the summons could not have been made upon defendant with due diligence within the State of New York. It is also our opinion that the personal service of the summons referred to in subdivision 4 of section 977-b of the Civil Practice Act, means valid personal service, sufficient to subject a defendant to the jurisdiction of the court. From the record it is by no means clear that the corporate defendant has been conducting business within the state to such an extent as to subject it to service of process (cf. Tauza v. Susquehanna Coal Co., 220 N. Y. 259; Sterling Novelty Corp'n v. Frank & Hirsch Dist. Co., 299 N. Y. 208).

We do not reach defendant's argument that the statute is unconstitutional. The record does not disclose that the question was presented at Special Term (cf., however, Oliner v. American-Oriental Banking Corporation, 252 App. Div. 212, aff'd 277 N. Y. 588; Stephen v. Zivnostenska Banka Nat. Corp'n, 3 N. Y. 2d 931).

Neither do we see any improper exercise of discretion in the Special Term's denial of defendant's motion to substitute the chairman of its board of directors as temporary receiver in the place of the receiver appointed by the court.

[fol. 101]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT OF F. SHELTON FARR, READ IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

State of New York,
County of New York, ss.:

F. Shelton Farr, being duly sworn, deposes and says:

1. I am a general partner of the co-partnership of Farr, Whitlock & Co. and one of the defendants in this action.

2. I am making this affidavit in opposition to the motion of the plaintiff against Farr, Whitlock & Co. for summary judgment.

3. I am familiar with the port of Santa Maria, which is a sub port of the main port of Jucaro, on the southern coast of Cuba, and I have personally attended the loading of sugar on a ship at said port and have had occasion frequently to discuss the port and the loading procedure with persons whom I know to be personally familiar with such port and loading procedures.

There is no wharf at Santa Maria (Jucaro), and the sugar is placed on barges in quantities of about 110 tons per barge and towed out about 5 or 6 miles to the ship. I am informed that the waters in the Port of Santa Maria (Jucaro), are shallow and that no ship can be brought in [fol. 102] or loaded within 4 miles of the port and that the average loading distance from the port is between 4 and 6 miles. On the occasion when I attended the loading of a ship at this port the ship I believe, was at a distance of between 4 to 6 miles from the port. I am informed that the S. S. Hornfels on which the sugar which is the subject of this action was loaded has a "Deadweight" Tonnage of about 7200 tons and a draft fully loaded of some 21 ft. 5½ in.

4. I do not know and have not been able yet to discover at what distance from the port the S. S. Hornfels was loaded between August 6th and August 9th, 1960, but it appears likely that such loading may have taken place outside of the Territorial Waters of Cuba.

It is respectfully submitted that plaintiff's motion for summary judgment against Farr, Whitlock & Co. should be denied.

F. Shelton Farr.

(Sworn to November 23, 1960.)

[fol. 103]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY AFFIDAVIT OF VICTOR RABINOWITZ, READ IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

State of New York,
County of New York, ss.:

Victor Rabinowitz, being duly sworn, deposes and says:

This affidavit is submitted in reply to the affidavits of the defendants in opposition to the motion for summary judgment.

I

The defendant Farr Whitlock, in its opposing papers, has attempted to raise issues of fact so as to avoid summary judgment against it on this motion. Those issues are spurious.

First: Defendant Farr Whitlock contends that "There are genuine issues of fact with respect to Cuban law as applied to the sugar in question" (p. 5 of Mr. Whitlock's affidavit). He complains that the affidavit attached to the moving papers is insufficient to establish the precise terms of the law. We think that affidavit is sufficient; however, in order to avoid any further argument on the matter, we are submitting herewith the original of a certificate signed by Dr. Carlos Olivares Sanchez, attorney at law and Minister of Foreign Relations of the Republic of Cuba. That certificate, issued under the official seal of the Ministry of Foreign Relations, sets forth the text of the statutes in translation. [fol. 104] The first document set forth is Law 851, promulgated on July 6, 1960, which authorizes the President and the Prime Minister of Cuba to nationalize the properties of corporate persons who are nationals of the United States or of enterprises in which nationals of the United States have an interest, even though organized under Cuban laws. C.A.V. comes within the latter category. The second document set forth is Executive Power Resolution No. 1 of August 6, 1960, by the terms of which the Cuban Government

nationalized all of the property of twenty-six sugar companies, one of which was the company involved in this lawsuit. By paragraph First of that resolution, all of the property and enterprises of the companies located in national territory are expropriated; by article Second the Cuban State is subrogated in the place and stead of the owners thereof.

It will be noted that this was published in Official Gazette No. 16 (special issue) of August 6, 1960.

Second: Farr Whitlock claims that it executed the contract to purchase the sugar on August 11, 1960, "after the Cuban Nationalization Decree of August 6, 1960" (p. 6 of Mr. Whitlock's affidavit) and that plaintiff was in error when it contended that the contracts to purchase sugar were entered into on February 6, 1960 and July 13, 1960. Defendant's version of the facts is more helpful to plaintiff's cause than is plaintiff's version; certainly the "factual issue" attempted to be raised by this assertion cannot help defendant.

If defendant is correct, it knew, when it entered into the contracts to buy sugar, that the sugar companies had already been nationalized and that it was purchasing sugar which had been expropriated from C.A.V. Nevertheless, it entered into a contract to purchase that sugar. The high moral tone now adopted by Mr. Whitlock, in which he refers to the Cuban decree as "confiscatory" (p. 8) hardly squares [fol. 105] with his own participation in that confiscation. However reprehensible it may now think the policy of the Cuban Government to have been, on August 11, 1960, after that policy had been effectuated, it joined in the policy in order to make a profit. It certainly does not lie in the mouth of Farr Whitlock to raise questions as to plaintiff's title to the sugar when it bought the sugar with full knowledge of whatever defects in title there might have been.

Third: Defendant Farr Whitlock claims that 4,031 bags of sugar out of a total of 22,176 had actually been loaded on a ship four or five miles off the coast on the day that the Nationalization Decree took effect; hence, it is argued, the sugar in question was outside the territorial jurisdiction of the Cuban Government. Aside from the fact that this is

only a partial defense affecting only about 18.2% of the total claimed, it is not well founded as a matter of law.

An examination of a map of Cuba, which will be submitted to the Court on argument, will make it clear that the site at which the ship was loaded, four or five miles off the Bay of Santa Maria, was inside a well-defined archipelago in the kind of formation clearly within the territorial waters of the littoral state. Authorities in the field of international law and territorial waters are unanimous in treating such formations as part of territorial waters. Indeed, the southern coast of Cuba is often cited as a classic example of a series of archipelagos in which the enclosed waters constitute "a mere salt water lake" so that "the boundary of the land of Cuba runs along the exterior edge of the banks." Hall: International Law, 5th Edition, 1904, p. 125; see also, Colombos: The International Law of the Sea, 1959, p. 74.

But we need not rely only on learned authorities because the Government of the United States has for almost a hundred years specifically recognized that the three mile limit as applied to Cuba is to be measured from the outside of the keys which surround about 50% of the island of Cuba. On August 10, 1863, in a note addressed by then Secretary of [fol. 106] State William Seward to the Spanish Ambassador to the United States, Mr. Tassara, the policy of the United States was set forth in these words:

> "The undersigned has examined what are supposed to be accurate charts of the coast of Cuba and . . . he has ascertained that nearly half of the coast of Cuba is practically free from reefs, rocks and keys, and that the seas adjacent to that part of the island which includes the great harbors of Cabanos, Havana, Matanzas and Santiago are very deep . . .
>
> The undersigned has further ascertained, as he *thinks, that the line of keys which confront other portions of the Cuban coast, resemble in dimensions, constitution and vicinity to the mainland, the keys which lie off the Southern Florida Coast of the United States. The undersigned assumes that this line of keys is properly to be regarded as the exterior coastline,* and that the inland jurisdiction ceases there, while the maritime

jurisdiction of Spain begins from the exterior sea front of the keys." (Emphasis supplied.) 1 Moore's Digest of International Law, 711.

Subsequently, the Secretary of State (then Mr. Hamilton Fish), in a letter to Secretary of Navy Borie on May 18, 1869, confirmed this opinion as follows:

"The maritime jurisdiction of Spain may be acknowledged to extend not only to a marine league beyond the coast of Cuba itself but also to the same distance from the coastline of the several islets or keys with which Cuba itself is surrounded. Any acts of Spanish authority within that line can not be called into question, provided they shall not be at variance with law or treaties." 1 Moore, *ibid.*, 713.

[fol. 107] This policy has been adhered to by the United States throughout the intervening period. When, in 1928, the League of Nations embarked on the task of codifying international law with respect to territorial waters, it solicited the view of the United States with respect to the treatment to be afforded archipelagos. The United States, in its response dated March 16, 1929, referred to the Seward and Fish notes as an accurate statement of the national policy with respect to such coastlines. (League of Nations Conference for the Codification of International Law, Vol. II, C 74, M 39, 1929V.)

The Republic of Cuba has always asserted that waters within these keys constitute territorial waters and, so far as we know, this assertion has never been challenged by anyone. Article 3 of the Fundamental Law of the Republic, dated February 7, 1959, provides:

"The territory of the Republic consists of the Island of Cuba, the Isle of Pines and the other islands and keys adjacent thereto that were, together therewith, under and subject to the sovereignty of Spain up to the ratification of the Treaty of Paris of December 10, 1898."

Nor is this all. The opposing affidavits of Mr. Whitlock and Mr. Farr establish that the ship in question was being loaded at the roadstead which, in international law, is regarded as within the territorial waters of the littoral state, regardless of the distance from the shore; thus, Professor Colombos says:

> "Roadsteads which are normally used for the loading, unloading and anchorage of vessels and which would otherwise be situated wholly or partly outside the outer limit of the territorial sea, are included in the territorial sea." (The International Law of the Sea, p. 149)

[fol. 108] Fourth: Finally, Farr Whitlock argues that Mr. Blanchenay, Manager of Societe Generale, was in error when he stated that a Farr Whitlock representative promised payment of the draft to a Societe Generale representative. Out of the entire story of fraud and deception set forth in the moving papers, defendant has picked one trivial and non-essential allegation to challenge and has admitted, either by implication or expressly, the other allegations of the moving papers.

Thus, it is admitted that on August 26, 1960, at a time when it knew that the draft and bills of lading would shortly be presented to it, Farr Whitlock entered into an agreement with C.A.V. whereby, for a fee of 10%, it agreed to seize the bills of lading and the sugar they represented, but to withhold the purchase price therefor, an agreement which could not be carried out except by violating the law of this State. When the bills of lading were finally presented *accompanied by* the draft and to be accepted only on payment of the draft, Farr Whitlock, in violation of the law and the conditions of the presentation of the bills of lading, seized possession of the bills of lading and negotiated them, but refused to pay the draft.

These admitted facts constitute fraud and are quite sufficient to establish plaintiff's cause of action quite regardless of whether or not on the morning of August 29, there occurred the conversation Mr. Blanchenay alleges. Even if the parties had said nothing to each other; even if the

Societe Generale representative had handed over the bills of lading and the draft to Farr Whitlock, and Farr Whitlock had accepted them, in pantomime, the legal effect would have been exactly the same. (See plaintiff's Memorandum, pp. 9-16 inclusive.)

[fol. 109]

II

At pages 12 and 13 of Mr. Whitlock's affidavit, he argues that quite regardless of the issues of fact, summary judgment should not be awarded until "all proper parties" are before the Court. However, he does not say how he proposes to bring all parties before the Court nor does he seem to have taken any steps at all to effectuate this purpose. We would gather from a reading of his affidavit that he proposes to wait until the Kings County action has been determined before proceeding with this case. Upon information and belief, the Kings County action involves assets totalling perhaps ten times the amount involved in this litigation. There is little doubt that the proceedings in New York Courts will be extended and that several years may well elapse before the entire litigation, including the inevitable appeals, has been concluded. Indeed, previous experience in our state courts with proceedings under Section 977b of the Civil Practice Act would seem to indicate the likelihood that we may not see the end of that litigation for five years.

We can see no reason why plaintiff should be compelled to wait that extended period of time before recovering its funds from the defendant.

This action was commenced on October 10, 1960, almost two months ago. On October 11 we were before this Court, seeking a temporary stay to enjoin the Receiver and Farr Whitlock from proceeding further in Brooklyn. That application was vigorously opposed by counsel for the Receiver and for Farr Whitlock. On November 10 we were before this Court again and once again Farr Whitlock requested an adjournment, and again it was granted over our objection. The result of all of these adjournments has evidently been to enmesh Farr Whitlock more and more deeply into the proceedings in Kings County. Had it consented to the temporary restraining order in the first place

[fol. 110] and had it not made continual requests for adjournments, it would not now be in the disadvantageous position in which it claims to find itself.

This action was started before Farr Whitlock paid anything over to the Receiver. There is no reason why this Court should be deprived of jurisdiction because, after this action was commenced, another court directed Farr Whitlock to pay certain moneys over to it.

Actually, of course, Farr Whitlock need have no fears of double liability. In the first place, defendant has an indemnity agreement with the sugar company and can collect on that indemnity should it become necessary. In the second place, a judgment by this Court that the money in question belongs to the plaintiff would of course be an adjudication which the state courts would honor, and, finally, both Farr Whitlock and the Receiver are before this Court, and the Court is quite capable in the present posture of matters, to make a final adjudication, not only as between plaintiff and Farr Whitlock but as between Farr Whitlock and the Receiver.

The very most that can be said is that Farr Whitlock will have to engage in further litigation, either in this Court or in the Supreme Court, to establish its right to the funds in question. No reason appears why plaintiff should have to bear the burden of that litigation since, on the facts shown here, there can be little question that it is entitled to recovery of the amount sought.

III

The Receiver, in an affidavit signed by Mr. Fisher, his attorney, argues that the plaintiff's right to the funds in question has already been litigated (and decided adversely to plaintiff) in the Kings County action, although plaintiff is not a party to the action. This unusual conclusion is based on the theory that Societe Generale which, to some [fol. 111] extent, participated in the Kings County proceedings, was acting as the agent for plaintiff and that plaintiff is therefore bound by a decision against Societe Generale.

It is true that at various times in the papers before this Court, Societe Generale has been referred to as the "collecting agent" for the plaintiff and as the "New York agent" of the plaintiff. It is perfectly obvious from the context in which these expressions are used that Societe Generale, which is a private bank in New York having no connection with the Cuban government at all, was acting as the agent for Banco Nacional in a commercial transaction, for the purpose of collecting a sight draft. It is not a general agent; it was not generally authorized to appear for the plaintiff in litigation or to receive process for plaintiff; in fact, its appearance in the Supreme Court was without the approval of the plaintiff. It is absurd to say that the action of Societe Generale, acting without any authorization whatsoever, was sufficient to bind plaintiff.

Furthermore, the attorney for the Receiver knows perfectly well that Societe Generale was itself not a party to the Supreme Court case, it never having been served with process and it never having moved to intervene. And, finally, the Supreme Court proceedings did not determine title to the funds in question but merely the right to possession. *Propper* v. *Clark*, 337 U. S. 472, at 493.

Victor Rabinowitz.

(Sworn to December 5, 1960.)

[fol. 112]

EXHIBIT, ANNEXED TO REPLY AFFIDAVIT OF VICTOR RABINOWITZ

I, DOCTOR CARLOS OLIVARES SANCHEZ, Attorney-at-Law, Minister of Foreign Relations of the Revolutionary Government of the Republic of Cuba,

HEREBY CERTIFY:

FIRST: That under date of July the sixth, nineteen hundred and sixty, The Council of Cabinet Ministers promulgated Law—Number Eight Hundred and Fifty-one which, literally transcribed, reads that:

MINISTRY OF THE TREASURY

I, DR. OSVALDO DORTICOS TORRADO, President of the Republic of Cuba, do hereby make known that the Council of Ministers has enacted and I have approved the following legislation:

WHEREAS, the attitude assumed by the government and the Legislative Power of the United States of North America, which constitutes an aggression, for political purposes, against the basic interests of the Cuban economy, as recently evidenced by the Amendment to the Sugar Act just enacted by the United States Congress at the request of the Chief Executive of that country, whereby exceptional powers are conferred upon the President of the United States to reduce the participation of Cuban sugars in the American sugar market as a threat of political action against Cuba, forces the Revolutionary Government to adopt, without hesitation, all and whatever measures it may deem appropriate or desirable for the due defense of the national sovereignty and protection of our economic development process.

[fol. 113] WHEREAS, Article 24 of the Fundamental Law of the Republic authorizes the forced expropriation of property, leaving it to the ordinary laws to confer authority and competent jurisdiction to decree the expropriations and to regulate the procedure for the accomplishment thereof and the means and terms for the payment of the expropriated property.

WHEREAS, it is advisable, with a view to the ends referred to in the first Whereas of this Law, to confer upon the President and Prime Minister of the Republic full authority to carry out the nationalization of the enterprises and property owned by physical and corporate persons who are nationals of the United States of North America, or of enterprises which have majority interest or participations in such enterprises, even though they be or-

ganized under the Cuban laws, so that the required measures may be adopted in future cases with a view to the ends pursued.

NOW, THEREFORE: In pursuance of the powers vested in it, the Council of Ministers has resolved to enact and promulgate the following

LAW No. 851

ARTICLE 1. Full authority is hereby conferred upon the President and the Prime Minister of the Republic in order that, acting jointly through appropriate resolutions whenever they shall deem it advisable or desirable for the protection of the national interests, they may proceed to nationalize, through forced expropriations, the properties or enterprises owned by physical and corporate persons who are nationals of the United States of North America, or of the enterprises in which such physical and corporate persons have an interest, even though they be organized under the Cuban laws.

[fol. 114] ARTICLE 2. In the resolutions providing for the expropriations the President and the Prime Minister of the Republic shall declare the necessity, public utility and national interest justifying such action.

ARTICLE 3. The President and the Prime Minister of the Republic shall also designate in the resolutions above referred to in Article I of this Law, the persons or agencies that shall have charge of the administration of the properties or enterprises expropriated hereunder.

ARTICLE 4. Once the expropriation of a property has been consummated and the administration thereof taken over by the person or agency designated therefor, the President and the Prime Minister of the Republic shall appoint appraisers of their election to determine the value of the expropriated property for the purposes of the payment thereof, which shall be effected as provided in the following article.

ARTICLE 5. The payment for the expropriated property shall be made, after the due appraisal thereof, in accordance with the following rules, to wit:

a) The payment shall be made in Bonds of the Republic, which will be issued for that purpose by the Cuban State and shall be subject to the terms and conditions set forth in this Law.

b) For the amortization of said bonds, and by way of security therefor the Cuban State shall set up a sinking fund which shall be fed annually with twenty-five per cent (25%) of the foreign exchange corresponding to the excess of the purchases of sugar made in each calendar year by the United States of North America over and above Three Million (3,000,000) Spanish Long Tons, for their domestic consumption, at a price of not less than 5.75 cents [fol. 115] of a dollar per English pound (F.A.S.). To this end the National Bank of Cuba shall open a special dollar account which shall be captioned "Fund for the Payment of Expropriations of Properties and Enterprises of Nationals of the United States of North America."

c) The Bonds shall draw at least two per cent (2%) annual interest, which shall be paid only and exclusively out of the fund to be set up and fed pursuant to Rule b).

d) Such annual interest as cannot be paid out of said Fund referred to above in Rule b) shall not be cumulative, but—the obligation to pay it shall be deemed extinguished.

e) The Bonds shall be amortized in a period of not less than thirty (30) years counted from the date on which the expropriation of the property or enterprise involved is actually consummated, and the President of the National Bank of Cuba is hereby authorized to determine how and to what extent they will be amortized.

ARTICLE 6. The resolutions jointly issued by the President and the Prime Minister of the Republic in the forced expropriation proceedings instituted hereunder may not be appealed, as no remedial action shall be available thereagainst.

ARTICLE 7. The Minister of the Treasury is hereby directed to issue, in the name and behalf of the Cuban State, the bonds with which the property expropriated hereunder will be paid for.

ARTICLE 8. This Law supersedes all and whatever legal and statutory provisions may be repugnant hereto, or may conflict with the enforcement hereof, and shall become operative from the date of its publication in the Official Gazette of the Republic.

[fol. 116] NOW THEREFORE: I hereby order that this law be fully and strictly observed and enforced.

Done at the Presidential Palace, in Havana, this 6th day of July, 1960.

OSVALDO DORTICOS TORRADO
President

Fidel Castro Ruz, Prime Minister.

Rolando Díaz Aztaraía, Minister of the Treasury.

(Official Gazette No. 130, of July 7, 1960.)

(SEAL)

SECOND: That on August the sixth, nineteen hundred and sixty, the Hon. President of the Republic and the Prime Minister of the Revolutionary Government, issued Resolution Number One, the literal transcription thereof being as follows:

EXECUTIVE POWER

RESOLUTION No. 1.

WHEREAS, Law No. 851, of July 6, 1960, published in the Official Gazette of July 7, 1960, authorized the undersigned to provide, through joint resolutions, whenever they deem it advisable in order to defend

the national interests, for the nationalization through compulsory expropriation, of the property or enterprises owned by physical and corporate persons who are nationals of the United States of North America, and the enterprises in which such persons have any interest or participation, even though they have been organized under the Cuban laws.

WHEREAS, the attitude assumed by the Government and the Legislative Power of the United States of North America, of continued aggression, for political purposes, against the basic interests of the [fol. 117] Cuban economy, as evidenced by the amendment to the Sugar Act adopted by the Congress of said country, whereby exceptional powers were conferred upon the President of said nation to reduce the participation of Cuban sugars in the sugar market of said country, as a weapon of political action against Cuba, was considered as the fundamental justification of said law.

WHEREAS, the Chief Executive of the Government of the United States of North America, making use of said exceptional powers, and assuming an obvious attitude of economic and political aggression against our country, has reduced the participation of Cuban sugars in the North American market with the unquestionable design to attack Cuba and its revolutionary process.

WHEREAS, this action constitutes a reiteration of the continued conduct of the government of the United States of North America, intended to prevent the exercise of its sovereignty and its integral development by our people thereby serving the base interests of the North American trusts, which have hindered the growth of our economy and the consolidation of our political freedom.

WHEREAS, in the face of such developments the undersigned, being fully conscious of their great historical responsibility and in legitimate defense of the national economy are duty bound to adopt the measures deemed necessary to counteract the

harm done by the aggression inflicted upon our nation.

WHEREAS, according to our constitutional and legal regime, in the exercise of our sovereignty and as a measure of internal legislation, believing that it is advisable, in the face of the consummation of [fol. 118] the aggressive measures referred to in the foregoing clauses, to exercise the powers vested in the undersigned by Law No. 851, of July 6, 1960, i.e., to proceed to the compulsory expropriation in favor of the Cuban State of property and enterprises owned by juridical persons that are nationals of the United States of North America, as a decision justified by the necessity of our nation to be indemnified for the harm done to its economy and to affirm the consolidation of the economic independence of the country.

WHEREAS, the "Compañía Cubana de Electricidad" and the "Cuban Telephone Company" represent typical examples of the profiteering and despoiling monopolies which have exploited and taken undue advantage, for many years, of the economy of the nation and the interests of the people.

WHEREAS, the sugar manufacturing companies took possession of the best lands of our country under the protection of the Platt Amendment, an ominous clause designed to permit control of the national economy which facilitated the invasion of the country by the imperialistic capital of its insatiable and unscrupulous foreign masters who have recovered many times the value of their investments.

WHEREAS, the petroleum companies have continuedly robbed the economy of the nation by charging monopoly prices which resulted, for many years, in heavy disbursements of foreign exchange and, in their eagerness to perpetuate their privileges, ignored the laws of the nation and hatched a criminal scheme to boycott our country, thereby forcing the Revolutionary Government to provide for their intervention.

[fol. 119] WHEREAS, it is the duty of the peoples of Latin America to strive for the recovery of their native wealth by wresting it from the hands of the foreign monopolies and interests which prevent their development, promote political interference, and impair the sovereignty of the underdeveloped countries of America.

WHEREAS, the Cuban Revolution will not stop until it shall have totally and definitely liberated its fatherland.

WHEREAS, Cuba must be a luminous and stimulating example for the sister nations of America and all the underdeveloped countries of the world to follow in their struggle to free themselves from the brutal claws of Imperialism.

NOW, THEREFORE: In pursuance of the powers vested in us, in accordance with the provisions of Law No. 851, of July 6, 1960, we hereby,

RESOLVE:

FIRST: To order the nationalization, through compulsory expropriation, and, therefore, the adjudication in fee simple to the Cuban State, of all the property and enterprises located in the national territory, and the rights and interests resulting from the exploitation of such property and enterprises, owned by the juridical persons who are nationals of the United States of North America, or operators of enterprises in which nationals of said country have a predominating interest, as listed below, to wit:

1.—Compañía Cubana de Electricidad.

2.—Cuban Telephone Company (Compañía Cubana de Teléfonos).

[fol. 120]

3.—Esso Standard Oil, S.A. División de Cuba.

4.—Texas Co. West Indies (Ltd.).

5.—Sinclair Cuba Oil Co., S.A.

6.—Central Cunagua, S.A.

7.—Compañía Azucarera Atlántica del Golfo, S.A.

8.—Compañía Central Altagracia, S.A.

9.—Miranda Sugar Estates.

10.—Compañía Cubana, S.A.

11.—The Cuban American Sugar Mills.

12.—Cuban Trading Company.

13.—The New Tuinicú Sugar Co. Inc.

14.—The Francisco Sugar Company.

15.—Compañía Azucarera Céspedes.

16.—Manatí Sugar Company.

17.—Punta Alegre Sugar Sales Company.

18.—Baraguá Industrial Corporation of New York.

19.—Florida Industrial Corporation of New York.

20.—Maçareño Industrial Corporation of New York.

21.—General Sugar Estates.

22.—Compañá Azucarera Vertientes Camagüey de Cuba.

23.—Guantánamo Sugar Company.

24.—United Fruit Sugar Company.

25.—Compañía Azucarera Soledad, S.A.

26.—Central Ermita, S.A.

SECOND. Consequently, the Cuban State is hereby subrogated in the place and stead of the juridical persons listed in the preceding section, in respect of the property, rights and interests aforesaid, and of the assets and liabilities constituting the capital of said enterprises.

THIRD. It is hereby declared that these compulsory expropriations are carried out for the reasons

of public necessity and national interest referred to in the introductory clauses of this Resolution.

[fol. 121] FOURTH. In accordance with the provision contained in Article 3 of Law No. 851, of July 6, 1960, the National Institute of Agrarian Reform is hereby designated as the organization that will be in charge, through the Department of Industrialization of its "General Administration of Sugar Mills," and through the Cuban Petroleum Institute, and with all the powers inherent in the functions hereby entrusted to them, of the administration of the property enterprises constituting the subject of the expropriations provided for in this Resolution.

FIFTH. The organizations mentioned in the preceding section shall designate the officials elected by them, who, acting in their names, will take over the management of said property and enterprises without any limitation whatsoever; and once such managements shall have been assumed, they shall report such action to the undersigned in order to appoint the experts who will value the property expropriated hereunder, for the purposes of the payment therefor as directed by Law No. 851, of July 6, 1960.

SIXTH. The managers so designated are hereby further authorized to proceed to the immediate preventive intervention of the juridical persons, enterprises and property which are subsidiary and appurtenant or associated to those constituting the subject of this Resolution; and once such interventions shall have been effected, such steps shall be reported to the undersigned for proper action.

SEVENTH. Due authority is hereby conferred upon the organizations designated above, to proceed to the proper notifications of this Resolution to the legal representatives of the juridical persons thereby affected, and to carry out what has been resolved.

[fol. 122] EIGHTH. Due authority is hereby likewise conferred upon said organizations to issue, as a con-

sequence of the adjudications in favor of the Cuban State of the enterprises, property, rights and interests to which this Resolution refers, the proper orders to the respective Real Property Registrars, Provincial Registrars of Corporations, and Mercantile Registrars, to enter the consequent registrations in behalf of the Cuban State.

DONE in Havana, this 6th day of August, 1960.

Fidel Castro Ruz
Primer Ministro.

Osvaldo Dorticós Torrado
Presidente.

(Official Gazette No. 16 (Special Issue) of August 6, 1960.)

(SEAL)

THIRD: That the legal resolutions hereinabove transcribed remain in full force and effect, without their having been either revoked, suspended or modified, in whole or in part.

AND, FOR RECORD PURPOSES, the Certificate hereof is issued, in the City of Havana, this twenty-fifth day of November, nineteen hundred and sixty,—"Year of the Agrarian Reform."

Dr C O S
Minister of Foreign Relations.
Dr. Carlos Olivares Sánchez.

(SEAL)

[fol. 123].

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT OF ROBERT L. AUGENBLICK, READ IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, AND IN SUPPORT OF MOTION OF FARR, WHITLOCK & CO. FOR SUMMARY JUDGMENT AGAINST DEFENDANT SABBATINO

State of New York,
County of New York, ss.:

ROBERT L. AUGENBLICK, being duly sworn, deposes and says:

I am of counsel to Choate, Mitchell, Baker & Nelson, the attorneys for defendant Farr, Whitlock & Co., in connection with various motions in the above matter returnable on December 15, 1960.

Annexed hereto is an affidavit of Jose Rodriguez Novas with respect to applicable provisions of Cuban law, which affidavit is herewith filed in opposition to plaintiff's motion for summary judgment and in support of the motion of Farr, Whitlock & Co. for summary judgment against defendant Sabbatino.

Robert L. Augenblick.

(Sworn to December 14, 1960.)

[fol. 124]

AFFIDAVIT OF JOSE RODRIGUEZ NOVAS, READ IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, AND IN SUPPORT OF MOTION OF FARR, WHITLOCK & CO. FOR SUMMARY JUDGMENT AGAINST DEFENDANT SABBATINO

State of New York,
County of New York, ss.:

JOSE RODRIGUEZ NOVAS, being duly sworn, deposes and says:

1. I am Director of Research for Latin America at the Parker School of Foreign and Comparative Law of Columbia University in the City of New York. I graduated in

1952 from the Faculty of Law of the University of Santiago, Spain, having studied there for five years and having received the degree of "Licenciado en Derecho" entitling me to practice law in Spain.

2. I am fully conversant with both the Spanish and English languages, having lived in Spain until 1954 and having lived since that time in the United States.

3. In connection with my position of Director of Research for Latin America of the Parker School of Foreign and Comparative Law of Columbia University, I am called up to examine and report on laws, legislation and decisions of Spain and Latin America, including the law, legislation and decisions of the Republic of Cuba. The result of my [fol. 125] research and reports in this field is used in publications of the Parker School of Foreign and Comparative Law, and in the preparation of teaching materials dealing with Latin American law given at the School of Law of Columbia University.

4. The following is an accurate translation of Article 1 of the Civil Code of Cuba, presently in full force and effect:

> Laws enter into force in Cuba three days from their promulgation, if no contrary provision is made in the laws themselves.
>
> The date of promulgation is understood as the day in which the insertion of the law in the Official Gazette of the Republic is completed.

Official acts of the Cuban Government having the force of law—whether by presidential proclamation, administrative regulation or decree, are subject to the provisions of the aforesaid article of the Civil Code. This appears from Article 1 of the Royal Ordinance of Spain of May 22, 1881, an English translation of which is as follows:

> Under the denomination of "laws" shall be understood also regulations, decrees, instructions, circulars, and orders prescribed by the Government pursuant to its powers.—

The fact that the Royal Ordinance of 1881 is law today in Cuba is confirmed by the current standard commentaries on the Civil Code of Cuba in their annotations to Article 1 thereof; see e.g. 1. Juan Arango y Garcia, *El Codigo Civil*, (1926, vol. I); 2. Eduardo Nunez y Nunez, *Codigo Civil*, (2d. Ed. 1949) (Vol. I); 3. *Nunez, Codigo Civil*, (one volume addition) (1956).

5. The following are correct translations of various articles, presently in effect, of the Civil Code of Cuba relating to the passage of title to property:

[fol. 126] ARTICLE 609

Property is acquired by occupation.

Property and other rights in goods are acquired and transmitted by operation of law, by donation, by testate or intestate succession, and as a consequence of certain contracts by means of delivery.

Property may also be acquired by means of prescription.

ARTICLE 1462

The object of sale shall be understood to have been delivered when it is placed in the power and possession of the purchaser.

When the sale is made by means of a public writing, the execution of such public documents shall be equivalent to the delivery of the object of the contract, if the same writing does not provide clearly otherwise.

ARTICLE 1463

Except for the cases expressed in the preceding article, delivery of movable goods shall be effected by delivery of keys to a place or site where they are stored or preserved; and by mere agreement of the contracting parties, if the object of the sale cannot be delivered into the power of the purchaser at the moment of sale, or if the latter already was in possession of the object of sale for some other reason.

ARTICLE 1095

The obligee has the right to the fruits of the property from the time that the obligation to make delivery arises. Nevertheless, he shall not acquire the property right in it until it has been delivered to him.

JOSE RODRIGUEZ NOVAS.

(Sworn to December 14, 1960.)

[fol. 127]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NOTICE OF MOTION FOR AN ORDER VACATING SERVICE OF SUMMONS

Sirs:

Please take notice that upon the annexed affidavit of Harold L. Fisher, sworn to the 17th day of October, 1960, and upon all the pleadings and proceedings herein, the undersigned will cross-move this Court at the Motion Part thereof, to be held at the United States Courthouse, Room 506, Foley Square, New York City, on the 25th day of October, 1960 at 10:00 o'clock in the forenoon, for an order vacating, as to Peter L. F. Sabbatino, Temporary Receiver of the assets, etc. of Compania Azucarera Vertientes-Camaguey de Cuba, appointed as such by the order dated August 16, 1960, made by Mr. Justice John E. Cone, Supreme Court of the State of New York, County of Kings, the service of the summons herein, dated October 10, 1960, and dismissing, as to him, the complaint herein, dated October 10, 1960, and granting to him such other and further relief as to the Court may seem just and proper.

Yours, etc.,

Harold L. Fisher & Ross J. Di Lorenzo, Attorneys for Peter L. F. Sabbatino, Temporary Receiver, Office & P. O. Address, 50 Court Street, Brooklyn 1, New York.

To: Rabinowitz & Boudin, Esqs., Attorneys for Plaintiff, 25 Broad Street, New York 4, New York.

[fol. 128]

AFFIDAVIT OF HAROLD L. FISHER, READ IN SUPPORT OF MOTION VACATING ORDER FOR SERVICE OF SUMMONS

State of New York,
County of Kings, ss.: ———

HAROLD L. FISHER, being duly sworn, deposes and says:

1. I am one of the attorneys for Peter L. F. Sabbatino, Temporary Receiver of the assets of Compania Azucarera Vertientes-Camagney De Cuba (hereinafter called Sugar Company) and as such am fully familiar with all of the facts and circumstances hereinafter set forth.

2. Heretofore, and on or about October 14, 1960, there was served upon said Peter L. F. Sabbatino, described therein "as Receiver" a Summons and Complaint, each dated October 10, 1960, seeking as to him, certain relief set forth in such Complaint.

3. Heretofore, and on August 16, 1960, Mr. Justice John E. Cone, a Justice of the Supreme Court of the State of New York, County of Kings, made an order, copy of which is annexed hereto and made a part hereof, in which, pursuant to Section 977-b of the Civil Practice Act of the State of New York, he appointed the said Peter L. F. Sabbatino, Temporary Receiver of the assets of the Sugar Company with power and direction only as follows:

> "Ordered, that Peter L. F. Sabbatino of No. 233 Broadway, New York, be and he hereby is appointed temporary receiver pending the determination of this action, and the said receiver is hereby directed to take, receive and reduce to his possession any and all assets, [fol. 129] property credits and choses in action, tangible or intangible, within the State of New York, and hold the same until the further order of this Court, and it is further
>
> Ordered, that the said temporary receiver shall have all the powers and duties in accordance with those herein provided for as are possessed by and conferred upon receivers and trustees by the laws of the State of New York, . . ."

4. Neither such order, nor such section gives to the Temporary Receiver, nor does he have the power and direction to, nor is he carrying on business connected with the property of the said Sugar Company. Said Temporary Receiver is merely administering the property of said Sugar Company coming into his hands, within the State of New York subject always to the further order of the Court appointing him and is not engaging, other than such administration, so limited, in any act or transaction in connection with such property.

5. Title 28, Section 959 of the United States Code, so far as applicable, provides as follows:

> "1—, receivers * * * of any property, * * *, may be sued, *without leave of the court appointing them,* with respect to any of their *acts* or *transactions in carrying on business connected with such property.*"

6. No leave of the Court appointing said Temporary Receiver has been obtained by, nor has such leave even been applied for by the plaintiff herein, nor by its claimed agent Societe Generale.

7. Prior to the enactment of Title 28, Section 959 of the United States Code, in 1948, and its predecessor Section then Title 28, Section 125, no action of any kind could be brought in the Federal Court relating to property in the [fol. 130] custody of a Receiver without leave first having been obtained of the Court which appointed such Receiver.

8. By the enactment of Section 959 (and its predecessor, Section 125) no such action, without such leave is authorized, unless the cause is one clearly falling within the provisions thereof.

9. That Section does not authorize the bringing of this suit, without such leave, since this action seeks to establish a right to property in the custody, only, of the Temporary Receiver.

10. It is the plain mandate of Section 959 that suits may be brought, without permission of the Court appointing the Receiver, with relation to "acts" or "transactions"

of the Receiver "in carrying on business" entrusted to his care, and said Section has never been construed to permit suits against the Receiver to establish any right or title to the property which may be placed in his custody, without the permission of the Court which appointed him. The property being, at all times, under the control of the Court administering it, no suit, such as here, is permitted, without leave of such administering Court, to recover such property.

11. Since a Court of competent jurisdiction has taken possession of the property, involved in this suit, through the Temporary Receiver appointed by it, and since it has jurisdiction to determine all questions relative to the possession and title of such property, this suit contravenes Section 959, unless the Court which appointed the Temporary Receiver grants leave to the plaintiff herein to sue such Temporary Receiver.

Accordingly, it is respectfully prayed that the service of the Summons herein be vacated and the Complaint herein be dismissed, as to Peter L. F. Sabbatino, as Receiver.

Harold L. Fisher.

(Sworn to October 17, 1960.)

[fol. 131]

ORDER, ANNEXED TO AFFIDAVIT OF HAROLD L. FISHER

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

NATHAN SCHWARTZ, Plaintiff,

against

COMPANIA AZUCARERA VERTIENTES-CAMAGUEY DE CUBA, Defendant.

The plaintiff herein, having duly moved for the appointment of a receiver, pursuant to Section 977-b of the Civil Practice Act, and said motion having come on to be heard before me on the 16th day of August, 1960, at Special Term, Part II of this Court, and that said plaintiff having appeared by Brinsmade & Schafrann, his attorneys, and submitted in support of said motion the affidavit of Nathan Schwartz, sworn to the 12th day of August, 1960 wherein it appears that personal service of the summons cannot be effected within the State of New York with due diligence, and a summons and verified complaint alleging that the defendant is a foreign corporation, and has or may be entitled to assets, credits, choses in action or other property within the State of New York, and that such corporation has been dissolved, nationalized and has ceased to do business, and upon due deliberation and upon motion of Brinsmade & Schafrann, attorneys for plaintiff, it is

Ordered that Peter L. F. Sabbatino of No. 233 Broadway, New York, be and he hereby is appointed temporary receiver pending the determination of this action, and the [fol. 132] said receiver is hereby directed to take, receive and reduce to his possession any and all assets, property, credits and choses in action, tangible or intangible, within the State of New York, and hold the same until the further order of this Court, and it is further

Ordered, that the said temporary receiver shall have all the powers and duties in accordance with those herein provided for as are possessed by and conferred upon receivers and trustees by the laws of the State of New York, and it is further

Ordered, adjudged and decreed that the said temporary receiver, before entering upon the duties of his trust, execute to the People of the State of New York and file in the Office of the Clerk of Kings County his bond with sureties to be approved by a Justice of this Court in the penal sum of $5,000.00 conditioned for the performance of his duties as such receiver, and it is further

Ordered, adjudged and decreed that the said receiver may at any time, upon proper notice to all parties who have appeared in this action, apply to this Court for further or other instructions and powers necessary to enable the said receiver to fulfill his duties, and it is further

Ordered, adjudged and decreed that the said receiver shall forthwith deposit all moneys received by him in his own name as receiver, in the Kings Co. Trust Company, and no withdrawals shall be permitted therefrom, except as directed by this Court.

Dated: Brooklyn, N. Y., August 16th, 1960.

Enter,

J. C., J. S. C.

[fol. 133]

AFFIDAVIT OF HAROLD L. FISHER, DATED NOVEMBER 8, 1960

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

State of New York,
County of Kings, ss.:

HAROLD L. FISHER, being duly sworn, deposes and says:

1. I am one of the attorneys for Peter L. F. Sabbatino, Temporary Receiver of the assets of Compania Azucarera

Vertientes-Camaguey De Cuba (hereinafter called the Sugar Company) and as such am fully familiar with all of the facts and circumstances hereinafter set forth.

2. (a) This affidavit is submitted in opposition to the request for relief designated as "2" in the plaintiff's notice of motion dated October 31, 1960.

(b) This request is for an order pursuant to Rule 56 of the Rules of Civil Procedure as follows:

> "Granting summary judgment against the defendant Sabbatino directing him to pay over to the plaintiff the sum of $175,250.69."

3. (a) Peter L. F. Sabbatino is the Temporary Receiver of the assets of the Sugar Company having been appointed pursuant to an Order of the Supreme Court of the State of New York, County of Kings under the statutory authority of Section 977-b of the Civil Practice Act of the State of New York in an action entitled Nathan Schwartz v. Compania Azucarera Vertientes-Camague De Cuba.

(b) He has qualified and is acting as such Temporary Receiver.

[fol. 134] 4. (a) In the course of his duties, the Temporary Receiver examined, pursuant to subpoena, the books and records of Farr, Whitlock & Co. (hereinafter referred to as Farr) and became convinced that Farr had in its possession moneys belonging to the Sugar Company.

(b) As a result thereof, he moved, pursuant to Order to Show Cause dated October 4, 1960 and returnable at Special Term Part I of said Supreme Court on October 11, 1960 for an order directing Farr to turn over to him, as Temporary Receiver, such monies.

(c) The Order to Show Cause was addressed not only to Farr, but also to the Sugar Company and to Societe Generale, New York Agency, the acknowledged agent of the plaintiff herein. [While the plaintiff attaches the affidavits used in said motion to the motion papers now before the Court, it conveniently omits such Order to Show Cause and thereby does not inform the Court that its agent has already litigated right to possession of this fund.]

(d) The Court, Mr. Justice John E. Cone, after hearing oral argument, including counsel for the Societe Generale, rendered his decision in writing. A copy of said decision as it appeared in the New York Law Journal on October 18, 1960 is annexed hereto as Exhibit "A".

5. (a) In the argument of said motion, the plaintiff's agent, Societe Generale made claim to the fund on the ground that it belonged to the plaintiff here.

(b) Mr. Cone answered that contention when he wrote

> "* * * As to the question of title to the funds, it may well be that the Cuban Government acquired title to the same through nationalization. However, the acquisition under such circumstances is opposed by the defendant and by the receiver, who has title to the property of the defendant in the State of New York [fol. 135] pursuant to section 977-b, subdivision 19, of the Civil Practice Act, subject of course, to the establishment of true ownership, which can only be determined by the court after trial."

(c) Societe Generale has not taken any appeal from the order entered on October 24, 1960 effectuating the decision of Mr. Justice Cone, and in effect the plaintiff here is attempting by indirection to have this Court act as an appellate tribunal to review the action of the State Supreme Court.

6. (a) Plaintiff in its moving affidavit (affidavit of Victor Rabinowitz, sworn to on October 31, 1960), states in the first sentence of the first full paragraph on page 2 thereof that "We do not believe that there is any dispute as to the facts relevant to this motion, the only issues being those of law".

(b) This statement is far from accurate. A reading of the papers that plaintiff attaches to this affidavit immediately shows us that there is a question of fact that is disputed.

7. (a) Plaintiff claims that Farr, entered into an agreement to purchase sugar with the Banco Para El Comercio

Exterior De Cuba (hereinafter referred to as the Commercial Bank).

(b) In your deponent's moving affidavit submitted at Special Term in the Supreme Court (affidavit of Harold L. Fisher sworn to October 3, 1960, a certified copy of which is annexed to the moving papers here), your deponent stated, at paragraph 4(b) thereof, stated that Farr had entered into two agreements with General Sugar Estates, Inc., a wholly owned subsidiary of the Sugar Company. These two agreements covered the purchase of sugar here [fol. 136] alleged to have been made from the Commercial Bank. These statements were made based on copies of signed purchase orders between Farr, and Generale Sugar Estates, Inc. It was based on these contracts that Farr acknowledged that the proceeds "belonged" to the Sugar Company and it was based on such contracts that Judge Cone allowed Farr to retain its "commission".

(c) We see, therefore, that immediately and on the moving papers only there is a disputed question of fact, that must lead to a denial of a motion of summary judgment.

8. (a) That the plaintiff is not entitled to have summary judgment, as a matter of law, in these types of proceedings involving receiverships under Section 977-b of the Civil Practice Act of the State of New York is well known to the plaintiff's law firm.

(b) Annexed hereto (Exhibit "B") is a copy of an opinion of the Appellate Division of the Supreme Court of the State of New York, Second Department appearing in the New York Law Journal of November 7, 1960 in an action entitled Manalich v. Compania Cubana De Aviacion, S.A. In that action, also involving a Section 977-b receivership, the plaintiff's lawyers here represent the Cubana Airlines in that action. In fact, Mr. Leonard Boudin took part in the argument of such appeal.

(c) That decision refers to appeal taken by your deponent's firm from an order of Special Term, that *summarily and on papers only, where there were questions raised as to title* to any airplane, ordered the surrender by the receiver of the airplane. *The Appellate Division* reversed Special Term and *ordered a hearing.*

9. Here, the same lawyers as took part in the Cubana Airlines case, disregard what they must know to be the [fol. 137] law, and seek to have this Court, summarily, without a trial, and on papers only, order the Temporary Receiver to surrender possession of a large sum of money, and as aforesaid asks this Court to supersede a sister court, and without showing good reason asks this Court to, in effect, be both the trial and appellate court as to matters entirely within the purview and jurisdiction of a court of competent jurisdiction.

10. (a) That plaintiff's only claim to the funds in question is based on seizure and nationalization of the Sugar Company's assets is the only undisputed fact in this motion.

(b) For this Court to grant summary judgment based solely on such a claim, would be giving effect to a nationalization decree of a foreign government, which the Courts of the State of New York have long held to be repugnant to the public policy of the State of New York.

Wherefore, it is respectfully requested that the prayer for relief requesting summary judgment against the defendant Peter L. F. Sabbatino as contained in item 2 of the notice of motion dated October 31, 1960 be denied.

Harold L. Fisher.

(Sworn to November 8, 1960.)

EXHIBIT A, ANNEXED TO AFFIDAVIT OF HAROLD L. FISHER

Opinion of Cone, J., New York Law Journal, October 18, 1960, printed at pages 79 and 80.

[fol. 138]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT OF HAROLD L. FISHER, DATED DECEMBER 1, 1960

State of New York,
County of Kings, ss.:

HAROLD L. FISHER, being duly sworn, deposes and says:

1. I am one of the attorneys for Peter L. F. Sabbatino, Temporary Receiver of the assets of Compania Azucarera Vertientes-Camaguey de Cuba (hereinafter called Sugar Company) and as such am fully familiar with all of the facts and circumstances hereinafter set forth.

2. This affidavit is submitted in opposition to the application of the defendant Farr, Whitlock & Co. for summary judgment in their favor against the Temporary Receiver, in the amount of any judgment which the Court may render in favor of the plaintiff against them, on their Cross-Claim against the Temporary Receiver.

3. On behalf of the Temporary Receiver there will be argued simultaneously herewith a motion to dismiss the Cross-Claim against the Temporary Receiver.

4. On behalf of the Temporary Receiver there will be argued simultaneously herewith motions to vacate the service of the Summons herein, to dismiss the Complaint and Amendment to Complaint.

[fol. 139] 5. The facts set forth in my several affidavits in support of such motions, the law therein contained and the contentions therein made are herein reasserted, reaffirmed and adopted as applicable to this motion, with the same force and effect as if herein repeated.

Wherefore, it is respectfully requested that the motion of Farr, Whitlock & Co. for summary judgment against the Temporary Receiver be denied.

Harold L. Fisher.

(Sworn to December 1, 1960.)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NOTICE OF MOTION FOR SUMMARY JUDGMENT
—November 23, 1960

Please take notice, that upon the annexed affidavit of Emmet Whitlock, sworn to November 23, 1960, defendant Farr, Whitlock & Co. will move this Court at a Motion Term thereof, to be held at the United States Courthouse, Room 506, Foley Square, Borough of Manhattan, City of New York, on December 6, 1960, at 10 o'clock in the forenoon, for an order pursuant to Rule 56, granting summary judgment in favor of defendant Farr, Whitlock & Co. against defendant Peter L. F. Sabbatino, as Receiver, in the amount of any judgment which the Court may render in favor of plaintiff against defendant Farr, Whitlock & Co., [fol. 140] and granting such other and further relief as to the Court may seem just and necessary.

Dated: New York, New York,
November 23, 1960.

Yours, etc.,

Choate, Mitchell, Baker & Nelson, Attorneys for Defendant, Farr, Whitlock & Co., Office & P. O. Address, 43 Broad Street, New York, New York, By Winthrop S. Emmet, A Partner.

To: Rabinowitz & Boudin, Esqs., Attorneys for Plaintiff, Office & P. O. Address, 25 Broad Street, New York 4, New York.

Harold L. Fisher and Ross J. DiLorenzo, Esqs., Attorneys for Defendant, Peter L. F. Sabbatino, Office & P. O. Address, 30 Court Street, Brooklyn, New York.

[fol. 141]

AFFIDAVIT OF EMMET WHITLOCK, READ IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

State of New York,
County of New York, ss.:

EMMET WHITLOCK, being duly sworn, deposes and says:

I am a general partner in Farr, Whitlock & Co., one of the defendants herein. I make this affidavit in support of the motion of defendant, Farr, Whitlock & Co., for summary judgment in its favor against defendant Peter L. F. Sabbatino, as Receiver. I incorporate by reference herein my affidavit, sworn to November 23, 1960, in opposition to plaintiff's motion for summary judgment against defendant, Farr, Whitlock & Co., and I respectfully refer the Court to such other affidavit for the facts set forth therein.

Should the Court grant plaintiff's motion for summary judgment against defendant Farr, Whitlock & Co., this will presumably be on the basis that a nationalization decree of the government of Cuba vested ownership of the sugar in the Cuban government, and thereby in plaintiff's assignor, an agent of the Cuban government. Defendant Farr, Whitlock & Co. has paid the sum of $173,936.31, being the proceeds of such sugar, less certain commissions, to the defendant Peter L. F. Sabbatino, as Civil Practice Act §977-b Receiver of New York assets of Compania Azucarera Vertientes-Camaguey de Cuba (hereinafter "Vertientes-Camaguey"), in obedience to an order of Supreme Court, Kings [fol. 142] County directing defendant Farr, Whitlock & Co. to make such summary turnover. The Receiver claimed that he is entitled to these funds because Vertientes-Camaguey owned the sugar and the nationalization decree never divested it of ownership. If plaintiff's version of the meaning of the Cuban nationalization decree is correct, then the Receiver's version is in error and defendant Farr, Whitlock & Co. is entitled to judgment for the return of the moneys paid to the Receiver.

The motion herein of defendant Farr, Whitlock & Co. is alternative to its motion, made returnable concurrently herewith, to dismiss the complaint for lack of jurisdiction.

Emmet Whitlock.

(Sworn to November 23, 1960.)

In the United States District Court
For the Southern District of New York

Affidavit of Harold L. Fisher, Read in Opposition to Motion for Summary Judgment

State of New York,
County of Kings, ss.:

Harold L. Fisher, being duly sworn, deposes and says:

1. I am one of the attorneys for Peter L. F. Sabbatino, Temporary Receiver of the assets of Compañia Azucarera Vertientes-Camaguey de Cuba (hereinafter called the Sugar Company) and as such am fully familiar with all of the facts and circumstances hereinafter set forth.

[fol. 143] 2. This affidavit is submitted to supplement my affidavit of November 8, 1960 in opposition to the relief requested in item "2" of the plaintiff's notice of motion dated October 31, 1960, which item seeks summary judgment against the Temporary Receiver.

3. In my said affidavit of November 8, 1960 facts are set forth which, by themselves, warrant a denial of the motion for summary judgment against the Temporary Receiver.

4. In addition it should be noted that the Temporary Receiver has cross moved to vacate the service of the Summons herein and to dismiss the Complaint herein as to him and has moved to dismiss the Amended Complaint herein, as to him, on the ground that, as to the Temporary Receiver, this action contravenes Title 28, Section 959 of the United States Code, in that leave of the Court which appointed the Temporary Receiver to sue the Temporary Receiver was not obtained.

5. Additionally, it should be noted that the matter sought to be litigated in this action to wit: the title to funds in the hands of the Temporary Receiver, have already been litigated by the plaintiff, herein, through its authorized agent, the matter determined adversely to it, from which determination no appeal by it or its authorized agent

has been taken, and the time for it or its authorized agent so to do has expired.

6. As pointed out in Paragraph 3 of my affidavit of November 8, 1960 the Temporary Receiver, in the Supreme Court, Kings County, in the action in which he was appointed as such, moved to compel payment by Farr, Whitlock & Co., of the precise funds here involved, as funds belonging to the Sugar Company.

[fol. 144] 7. The proceeding to compel such payment was instituted by Order to Show Cause, which provided for service upon and was served upon Davis, Polk, Wardwell, Sunderland & Kiendl, Esqs., the attorneys for Societe Generale, as well as other Respondents therein.

8. Societe Generale appeared in such proceeding, submitted an affidavit by one Henri Blanchenay, its "manager and principal officer", and their attorneys, aforesaid, by Henry L. Kings, Esq., as well as other Respondents, were heard in opposition to the Temporary Receiver's said application.

9. In the said affidavit of Mr. Blanchenay, dated October 7, 1960, he described Societe Generale as "collecting agent for Banco Nacional de Cuba" (the plaintiff herein) and opposed the said application.

10. In paragraph 7 of the Complaint, herein, the plaintiff describes Societe Generale as " • • • the New York agent of the plaintiff • • • ".

11. In paragraph 9 of the Complaint, herein, the plaintiff alleges that Farr, Whitlock & Co. " • • • would not pay to Societe Generale, as Agent for plaintiff • • • " the precise fund, in issue in the Supreme Court proceeding, and here sued for.

12. On page 2 of the affidavit of Raul Lopez Gonzalez, dated October 9, 1960, submitted by the plaintiff in support of its companion motion for injunction, Societe Generale is described as " • • • its (the plaintiff's) New York agent • • • ".

13. On page 3 of the plaintiff's Memorandum in connection with this and other motions there is this paragraph:

> [fol. 145] "Societe Generale is a French bank which has an agency in New York City. In this transaction it acted as the agent for the plaintiff in N. Y. C."

14. After the decision by Judge Cone in the Supreme Court proceeding (Exhibit A, my affidavit of November 8, 1960) an Order with Notice of Settlement was served upon the attorneys for Societe Generale.

15. When that Order was signed by Judge Cone on October 24, 1960, it was, on the same day, served with Notice of Entry on such attorneys.

16. In the affidavit of Mr. Blanchenay, aforementioned, he stated:

> "In the capacity of collecting agent for Banco Nacional de Cuba, Societe General, New York Agency, has no interest in these monies beyond that of using due care in exercising all reasonable efforts to collect and of assuring that the rights of the forwarding bank are fully protected. To these ends, we
>
> (a) have kept Banco Nacional de Cuba fully informed of Far., Whitlock & Co.'s refusal to pay, of the proceedings in this action and of the instant motion by the Temporary Receiver;"

17. In spite of the participation of the plaintiff's agent in the Supreme Court proceeding, and the admitted knowledge of that proceeding by the plaintiff herein, neither the plaintiff nor its agent served a Notice of Appeal from the Order of Judge Cone, and the time so to do for the plaintiff and its agent has expired.

18. Accordingly, in addition to the facts and reasons set forth in my affidavit of November 8, 1960, which by [fol. 146] themselves warrant a denial of the motion for summary judgment as to the Temporary Receiver, I respectfully submit

A. If the motions of the Temporary Receiver to vacate the service of the Summons and dismiss the Complaint and Amended Complaint are granted, this motion for summary judgment as against the Temporary Receiver becomes moot; and

B. The facts herein set forth clearly establish that the determination and order of the Supreme Court are res adjudicata as to the plaintiff as against the Temporary Receiver, it having, through its agent, already litigated in such Supreme Court proceeding what it seeks to litigate here.

Wherefore, it is respectfully requested that for the reasons and facts set forth in my affidavit of November 8, 1960 and in this affidavit, the prayer for relief, contained in the Notice of Motion dated October 31, 1960, be denied.

Harold L. Fisher.

(Sworn to December 1, 1960.)

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

NOTICE OF MOTION BY PETER L. F. SABBATINO FOR ORDER DISMISSING AMENDMENT TO COMPLAINT—December 1, 1960

Sirs:

Please take notice that upon the annexed affidavit of Harold L. Fisher, sworn to the 1st day of December, 1960, and upon all the pleadings and proceedings herein, the undersigned will move this Court at the Motion Part [fol. 147] thereof, to be held at the United States Courthouse, Room 506, Foley Square, New York City, on the 6th day of December, 1960 at 10:00 o'clock in the forenoon, for an order dismissing, as to Peter L. F. Sabbatino, Temporary Receiver of the assets, etc. of Compania Azucarera Vertientes-Camaguey de Cuba, appointed as such by the order dated August 16, 1960, made by Mr. Justice John E. Cone, Supreme Court of the State of New York, County of Kings, the amendment to the complaint herein, dated

October 31, 1960, and granting to him such other and further relief as to the Court may seem just and proper.

Dated: Brooklyn, New York,
December 1, 1960.

Yours, etc.,

Harold L. Fisher & Ross J. Di Lorenzo, Attorneys for Peter L. F. Sabbatino, Temporary Receiver, Office & P. O. Address, 50 Court Street, Brooklyn 1, New York.

To: Rabinowitz & Boudin, Esqs., Attorneys for Plaintiff, 25 Broad Street, New York 4, New York.

Choate, Mitchell, Baker & Nelson, Esqs., Attorneys for Defendant Farr, Whitlock & Co., 43 Broad Street, New York 4, New York.

[fol. 148]

AFFIDAVIT OF HAROLD L. FISHER, READ IN SUPPORT OF MOTION DISMISSING AMENDMENT TO COMPLAINT

State of New York,
County of Kings, ss.:

HAROLD L. FISHER, being duly sworn, deposes and says:

1. I am one of the attorneys for Peter L. F. Sabbatino, Temporary Receiver of the assets of Compania Azucarera Vertientes-Camaguey de Cuba (hereinafter called Sugar Company) and as such am familiar with all of the facts and circumstances hereinafter set forth.

2. Heretofore, and on or about October 14, 1960, there was served upon said Peter L. F. Sabbatino, described therein "as Receiver" a Summons and Complaint, each dated October 10, 1960, seeking as to him certain relief set forth in such Complaint.

3. Heretofore, the Temporary Receiver Cross-Moved to vacate, as to him, the service of said Summons and to dismiss as to him, said Complaint on the ground that this suit contravenes Title 28, Section 959 of the United States Code, in that no leave of the Court which appointed the Temporary Receiver to sue him was obtained.

4. Thereafter, the plaintiff caused to be served Amendment to Complaint, dated October 31, 1960.

5. Reference is made to my affidavit of October 17, 1960 in support of the motion to vacate and dismiss, all of which is applicable to the Amendment to Complaint.

Wherefore, it is respectfully prayed that the Amendment to Complaint be dismissed, as to the Temporary Receiver.

Harold L. Fisher.

(Sworn to December 1, 1960.)

[fol. 149]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

NOTICE OF MOTION BY PETER L. F. SABBATINO FOR ORDER DISMISSING PART OF ANSWER OF FARR, ET AL.
—December 1, 1960

Sirs:

Please take notice that upon the annexed affidavit of Harold L. Fisher, sworn to the 1st day of December, 1960, and upon all the pleadings and proceedings herein, the undersigned will move this Court at the Motion Part thereof, to be held at the United States Courthouse, Room 506, Foley Square, New York City, on the 6th day of December, 1960, at 10:00 o'clock in the forenoon, for an order dismissing, as to Peter L. F. Sabbatino, Temporary Receiver of the assets, etc., of Compania Azucarera Vertientes-Camaguey De Cuba, appointed as such by the order dated August 16, 1960, made by Mr. Justice John E. Cone, Supreme Court of the State of New York, County of Kings, so much of the Answer of the defendants, F. Shelton Farr, et al., as is a Cross-Claim against the Temporary Receiver, and granting him such other and further relief as to the Court may seem just and proper.

Dated: Brooklyn, New York,
December 1, 1960.

[fol. 150] Yours, etc.,

Harold L. Fisher & Ross J. Di Lorenzo, Attorneys for Peter L. F. Sabbatino, Temporary Receiver, Office & P. O. Address, 50 Court Street, Brooklyn 1, New York.

To: Rabinowitz & Boudin, Esqs., Attorneys for Plaintiff, 25 Broad Street, New York 4, New York.

Choate, Mitchell, Baker & Nelson, Esqs., Attorneys for Defendant, Farr, Whitlock & Co., 43 Broad Street, New York 4, New York.

[fol. 151]

AFFIDAVIT OF HAROLD L. FISHER, READ IN SUPPORT OF MOTION DISMISSING PART OF ANSWER OF FARR, ET AL.

State of New York,
County of Kings, ss.:

HAROLD L. FISHER, being duly sworn, deposes and says:

1. I am one of the attorneys for Peter L. F. Sabbatino, Temporary Receiver of the assets of Compania Azucarera Vertientes-Camaguey De Cuba (hereinafter called Sugar Company) and as such am fully familiar with all of the facts and circumstances hereinafter set forth.

2. Heretofore, and on or about November 18, 1960, the defendants, F. Shelton Farr, et al., served an Answer herein to the amended Complaint herein.

3. Said Answer contains a Cross-Claim against the Temporary Receiver, by virtue of which it seeks to recover against him for any sum recovered against them herein by the plaintiff.

4. Reference is made to my affidavit of October 17, 1960 in support of the motion to vacate and dismiss, as to the Temporary Receiver, the Summons and Complaint herein, and my affidavit of December 1, 1960 in support of the

motion to dismiss the Amendment to Complaint, all of which is applicable to the Cross-Claim.

[fol. 152] 5. Said Cross-Claim contravenes Title 28, Section 959 of the United States Code, in that no leave of the Court which appointed the Temporary Receiver to Cross-Claim as against him was obtained.

6. Additionally, as is demonstrated by papers, affidavits and documents submitted in connection with companion motions in this action, the matter which is the subject matter of the Cross-Claim was litigated between the defendants, F. Shelton Farr, et al. and the Temporary Receiver in the Supreme Court, Kings County, and the determination therein is res adjudicata as to such defendants as against the Temporary Receiver, from which determination said defendants have appealed to the Appellate Division, 2nd Department.

Wherefore, it is respectfully prayed that the Cross-Claim be dismissed, as to the Temporary Receiver, upon either or both grounds set forth hereinabove.

Harold L. Fisher.

(Sworn to December 1, 1960.)

[fol. 153]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

OPINION OF DIMOCK, *J.*—March 31, 1961

Appearances:

Rabinowitz & Boudin, Esqs., Attorneys for Plaintiff, 25 Broad Street, New York 4, N. Y., Victor Rabinowitz, Esq., of Counsel.

Harold L. Fisher and Ross J. DiLorenzo, Esqs., Attorneys for Defendant Peter L. F. Sabbatino, 50 Court Street, Brooklyn, New York.

Choate, Mitchell, Baker & Nelson, Esqs., Attorneys for Defendant Farr, Whitlock & Co., 43 Broad Street, New

York 4, N. Y., Robert L. Augenblick, Esq., Winthrop S. Emmet, Esq., of Counsel.

DIMOCK, *D. J.*:

There are six motions before me in this complicated commercial litigation having its genesis in the Cuban nationalization situation.

The action centers about title to a sugar shipment which plaintiff, the financial agent of the Cuban government, asserts by reason of expropriation of the property of Compania Azucarera Vertientes-Camaguey, hereinafter C.A.V., a Cuban corporation, under nationalization decrees. The proceeds of the sale of this sugar shipment are now in the possession of the New York State Supreme Court for Kings County which, under section 977-b of the New York Civil Practice Act, appointed a temporary receiver for the [fol. 154] assets of C.A.V. located in New York. The receiver has been made a defendant in this action, although leave to sue him was not obtained from the court that appointed him. The remaining defendants are members of a New York partnership, Farr Whitlock & Co., hereinafter referred to as Farr Whitlock.

The following facts are agreed upon for the purpose of the present motions. In February and July of 1960, Farr Whitlock contracted to purchase sugar from a wholly-owned Cuban corporate subsidiary of C.A.V. The contracts called for the purchase of specified amounts of sugar at specified prices free alongside steamers. The seller was to supply cargo to vessels assigned by Farr Whitlock at a designated Cuban port. Payment was to be made by Farr Whitlock in New York upon presentation of the necessary shipping documents.

Loading of the sugar onto a German vessel assigned by Farr Whitlock commenced on August 6, 1960, a Saturday, continued on August 8th and was completed by 1 p.m. on August 9th. Since there was no wharf at the Cuban port, the sugar was carried on barges to the vessel.

On August 6, 1960, the Cuban President and Prime Minister signed a resolution nationalizing the property of C.A.V. and other named Cuban corporations. Both the

resolution and the law pursuant to which it was adopted declared that nationalization of Cuban enterprises in which United States "physical and corporate persons" held a majority interest was deemed a necessary defensive measure against the recent aggressive acts of the Congress and President of the United States reducing the participation of Cuban sugars in the American sugar market.

Farr Whitlock, in order to obtain the necessary consent of the Cuban government to have the loaded vessel depart, on August 11, 1960 entered into contracts with plaintiff's assignee, a government wholly-owned corporation. The contracts purported to sell to Farr Whitlock the sugar on [fol. 155] board the vessel. The contracts contained, insofar as here relevant, the same terms as those in the original agreements between Farr Whitlock and the C.A.V. subsidiary. The vessel departed for Casablanca, Morocco on August 11, 1960.

The sight draft and bills of lading covering the sugar shipment were delivered to Farr Whitlock, at its office in New York City, by plaintiff's agent. Farr Whitlock accepted the documents, negotiated the bills of lading to its customer and received the purchase price, in the amount of $175,250.69. Farr Whitlock did not, however, pay the proceeds to plaintiff's agent, since it had been advised that a receiver appointed by the New York State Supreme Court for C.A.V. claimed the right to the sales proceeds.

The receiver had been appointed pursuant to a statute authorizing receiverships for New York assets of foreign corporations that have been dissolved or the property of which has been nationalized. See New York Civ. Prac. Act § 977-b.

The state court which had appointed the receiver enjoined Farr Whitlock from disposing of the sales proceeds and subsequently issued an order, with which Farr Whitlock has complied, directing turnover of the sum to the receiver. The order directed the receiver to deposit the proceeds in the Kings County Trust Company "to be held by it subject to the further order of the court and not to be withdrawn except on such order."

Plaintiff in the present action, alleging conversion of the bills of lading and the sales proceeds, seeks recovery

either from Farr Whitlock or from the receiver. Plaintiff also, claiming that section 977-b of the New York Civil Practice Act violates the United States Constitution, and seeks appropriate relief by way of injunction and declaratory judgment. Farr Whitlock in the event that it is held liable to plaintiff seeks recovery over from the receiver. [fol. 156] I have before me the following six motions:

1. The receiver's motion to dismiss the complaint as against him because of failure to obtain leave from the receiver's appointing court to sue him.

2. The receiver's motion to dismiss the amended complaint on the same ground.

3. The receiver's motion to dismiss Farr Whitlock's cross-claim against him on the same ground.

4. Farr Whitlock's motion to dismiss the action against it for lack of jurisdiction over the subject matter.

5. Plaintiff's motion for summary judgment against Farr Whitlock and the receiver.

6. Farr Whitlock's motion for summary judgment against the receiver in the event plaintiff is granted summary judgment against Farr Whitlock.

I shall consider first Farr Whitlock's motion to dismiss the action against it for lack of jurisdiction of the court over the subject matter. Farr Whitlock relies on the well-established rule that, when a state court action and a federal court action are both in rem or quasi in rem and involve the same property, then the court first perfecting its jurisdiction over the property may maintain and exercise that jurisdiction to the exclusion of the other. Farr Whitlock's reasoning in support of its motion is impeccable up to a certain point. It argues that the state court receivership action is in rem or quasi in rem, which is quite true. See Oliner v. The American-Oriental Banking Corp., 2nd Dept., 252 App. Div. 212, aff'd without opinion, 277 N. Y. 588. It then argues that the state court first perfected jurisdiction over the sales proceeds here in issue, which is also true. But at this point Farr Whitlock's argument falters, since

plaintiff in the present action seeks merely to hold Farr Whitlock personally liable for its alleged conversion of the [fol. 157] documents delivered to it by plaintiff's agent as well as its alleged conversion of the sales proceeds. Application of the test laid down in United States v. Bank of New York & Trust Co., 296 U. S. 463, 477, leads to the inescapable conclusion that the present action against Farr Whitlock is not in rem or quasi in rem, for this court does not require possession or control of the sales proceeds of the sugar shipment in order to proceed with the cause and grant the relief sought, a money judgment against Farr Whitlock. Since the action against Farr Whitlock is in personam, it may proceed simultaneously with the state court action. United States v. Klein, 303 U. S. 276; see Markham v. Allen, 326 U. S. 490. Nor may this court decline to exercise or postpone exercise of its jurisdiction pending a state court determination, for such abstention here would serve no important countervailing interest. See County of Allegheny v. Mashuda, 360 U. S. 185. Farr Whitlock has had ample opportunity to protect itself from double liability in the event that it loses this law suit and the state court determines that C.A.V. had title to the sales proceeds within that court's possession. Up until now Farr Whitlock has not impleaded C.A.V. in this action and it has offered no explanation for its failure to do so.[1] Perhaps the reason lies in the fact that Farr Whitlock has an indemnification agreement with C.A.V. which protects it against double liability. Be that as it may, it is even doubtful whether a determination in the state court action would have any effect in this action. Plaintiff has not appeared in the state court action, and, although its agent who presented the documents to Farr Whitlock for collection has made an appearance, plaintiff denies that its collection agent repre- [fol. 158] sents its interest in the state court action. There is thus no need to decide whether the danger of double lia-

[1] New York law permits suit without court leave against one who is in receivership and production of any judgment secured thereby in the receivership proceeding. See, e.g., Pringle v. Woolworth, 90 N. Y. 502; Chicago Title & Trust Co. v. Fox Theatres Corp., 2 Cir., 69 F. 2d 60, 62.

bility would indeed be sufficient reason for this court to abstain from exercising jurisdiction insofar as the claim against Farr Whitlock is concerned pending the outcome of the state court proceeding.

The motion to dismiss for lack of jurisdiction over the subject matter is therefore denied.

Since I have come to the conclusion that, on plaintiff's motion for summary judgment against defendants Farr Whitlock and the receiver, those defendants are entitled to summary judgment dismissing the complaint, all of the rest of the motions are dismissed as moot.

I turn now to plaintiff's motion for summary judgment against Farr Whitlock and the receiver. Defendants' first claim is that plaintiff lost nothing by Farr Whitlock's failure to pay the draft because the terms of the nationalization decree did not embrace the sugar shipment at issue and plaintiff therefore had no interest in the sugar or the purchase price. Defendants' second claim is that, even if the decree did purport to affect the sugar, the sugar was located outside of Cuban territory when the decree took effect and hence courts of this country will not recognize the decree's extraterritorial effect. Defendants' third claim is based on the asserted unenforceability of the decree in courts of this country even if the decree on its effective date did relate to the sugar in issue and this sugar was situated within Cuban territory.

Defendants express their first claim as a claim that title had already passed to Farr Whitlock when the nationalization decree took effect. That is not the question, however. The question is whether C.A.V. had any interest in the sugar when the nationalization decree took effect.[2] The [fol. 159] problem immediately arises as to the law which governs the rights of the parties with respect to the ownership of the sugar. The choice lies between Cuban law and New York law. I find it unnecessary to make a choice of law. The principle involved is one of the law merchant common

[2] As has already been stated, Farr Whitlock actually made the contracts for the sugar purchase with a wholly-owned subsidiary of C.A.V. but the parties have treated the interests of that subsidiary as identical with the interests of C.A.V.

to civilized countries,[3] and hence I shall presume that the law of Cuba is the same on the present issue as that of New York. See De Sairigne v. Gould, Sup. Ct., 3 Misc. 2d 452, aff'd, 1st Dept., 1 A. D. 2d 820; 9 Wigmore on Evidence § 2536, at page 493 (3rd ed. 1940).

The contracts between C.A.V. and Farr Whitlock called for delivery of the sugar at a specified price free alongside steamer at the Cuban port of Santa Maria. Payment by Farr Whitlock was to be made in New York, in New York current funds, "on presentation of necessary shipping documents". Clearly, the "necessary shipping documents" included bills of lading. Farr Whitlock therefore could not assert ownership of the sugar against C.A.V. until Farr Whitlock had fulfilled the condition of payment and until such time C.A.V. retained a property interest in the sugar which it could assert against Farr Whitlock. See 2 Williston on Sales § 291, at page 189; §§ 292 and 285 (Revised ed. 1948). Since the language of the decree was sufficiently broad to reach this property interest of C.A.V.,[4] the claim that C.A.V. had no interest in the sugar which could be affected by the decree must be rejected.

I come now to defendants' second claim. Regardless of what the intent of the nationalization decree may have been, [fol. 160] I could not give effect to that decree if it purported to affect property interests in sugar which was located outside of Cuba at the time the decree took effect. Vladikavkazsky Ry. v. New York Trust Co., 263 N. Y. 369; Restatement, Foreign Relations Law of the United States § 28e (Tent. Draft No. 4, 1960). It is clear, however, that the decree purported to take effect before the ship carrying the sugar departed from Cuba. Defendants contend that the sugar was loaded onto the vessel outside of Cuban ter-

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[3] See 2 Williston on Sales § 293 (Revised ed. 1948).

[4] The decree assumed "to order the nationalization, through compulsory expropriation, and, therefore, the adjudication in fee simple to the Cuban State, of all property and enterprises located in the national territory, and the rights and interests resulting from such property and enterprises * * * listed below." Then followed a list of organizations which included C.A.V. The decree also covered all subsidiary enterprises of the named corporations.

ritory at a distance of four to six miles off the Cuban port of Santa Maria, which is a subport of the main port of Jucaro, on the southern coast of Cuba. I take judicial notice that the site at which the ship was loaded is inside a well-defined archipelago and that the line of keys forming this archipelago is part of Cuban territory. Given this state of facts, there can be no doubt that the waters between the keys and the mainland where the ship was loaded are part of Cuban territory. See 1 Moore's Digest of International Law 711, 713, containing statements by the United States Government which recognized these waters as part of Cuban territory when Spain was in possession of Cuba. I must therefore find that the decree purported to affect interests in sugar which was situated within Cuban territory on the decree's effective date.

Defendants' third claim is grounded fundamentally on the unenforceability in this forum of Cuba's decree nationalizing property of C.A.V. If in the contemplation of the courts of this country C.A.V. still owned the sugar at the time when the nominee of the Cuban government purported to sell it to Farr Whitlock, plaintiff, as assignee of that nominee, has no right to enforce, as it attempts in this suit, the contract of sale.

If the Cuban nationalization decree is not enforceable in the courts of this country plaintiff cannot recover. I may not refuse to enforce the nationalization decree on the ground that it did not comply with the formal requisites [fol. 161] imposed by Cuban law, and I therefore must reject Farr Whitlock's contention that there is an issue as to whether the decree was in fact published in the Official Gazette of Cuba, as Cuban law is said to require. See, e.g., Underhill v. Hernandez, 168 U. S. 259; United States ex rel. Von Heymann v. Watkins, 2 Cir., 159 F. 2d 650; Restatement, Foreign Relations Law of the United States § 28d(1) (Tent. Draft No. 4, 1960); Note, Acts of State and the Conflict of Laws, 35 N. Y. U. L. Rev. 234, 240-42 (1960); but see Shapleigh v. Mier, 299 U. S. 468, 471-73; Zander, The Act of State Doctrine, 53 Am. J. Int'l L. 826, 845-46 (1959). Nor am I free to refuse enforcement to the nationalization decree because it violates the public policy of the forum. E.g., Underhill v. Hernandez, 168 U. S. 250; Oetjen v. Cen-

tral Leather Co., 246 U. S. 297; Ricaud v. American Metal Co., 246 U. S. 304; Holzer v. Deutsche Reichsbahn-Gesellschaft, 277 N. Y. 474; Luther v. Sagor (1921), 3 K. B. 532.

The crucial question remains, however, whether this court can examine the validity of the Cuban act under international law and refuse recognition to the act if it is in violation of international law. Apparently, no court in this country has passed on the question. See Restatement, Foreign Relations Law of the United States § 28d(2) and comment e. thereto (Tent. Draft No. 4, 1960); Zander, The Act of State Doctrine, 53 Am. J. Int'l L. 826, 843, 845, supra. To be sure, there are dicta in a few cases but they furnish little aid. Contrast, e.g., Shapleigh v. Mier, 299 U. S. 468, 471, with Sulyok v. Penzinteziti, 1st Dep't, 279 App. Div. 528, 535, modified per curiam, 304 N. Y. 704.[5] [fol. 162] Foreign forums have evidenced some willingness to examine the validity of foreign acts under international law[6] but by far the strongest support for such examination

[5] The issue would have been germane for decision in Ricaud v. American Metal Co., 246 U. S. 304, where property in Mexico of a United States citizen was confiscated by what came to be the recognized Government of Mexico. But the issue was not raised and hence the language of the court foreclosing a reexamination by United States courts of acts of a foreign state within its own territory does not supply an answer to the problem in the present action.

[6] See Anglo-Iranian Oil Co., Ltd. v. Jaffrate (The Rose Mary), Supreme Court of Aden, [1953] 1 Weekly Law Reports 246; In re Fried Krupp A. G. [1917] 2 Ch. 188; Republic of Peru v. Dreyfus Brothers & Co. (1888) 38 Ch. D. 348; Wolff v. Oxholm, (1817) 6 M. & S. 92, 105 Eng. Rep. 1177; Czechoslovak Confiscatory Decree Case, (American Zone) Court of Appeals of Nuremberg, Germany, 1949, 1949 Ann. Dig. 19 (No. 10); Confiscation of Property of Sudeten Germans Case, Germany, Amtsgericht of Dingolfing (1948), 1948 Ann. Dig. 24 (No. 12); Anglo-Iranian Oil Co., Ltd. v. S.U.P.O.R. Co., Italy, Civil Court of Rome (1954), 1955 Int'l L. Rep. 23; Anglo-Iranian Oil Co. v. Idemitsu Kosan Kabuski Kaisha, High Court of Tokyo, Japan, 1953 Int'l L. Rep. 305; Domke, Indonesian Nationalization Measures Before Foreign Courts, 54 Am. J. Int'l L. 305 (1960) (discussion of Dutch court decision); but see Anglo-Iranian Oil Co., Ltd. v. S.U.P.O.R. Co., Italy, Court of Venice (1953), 1955 Int'l L. Rep. 19; Domke, op. cit. supra, (discussion of two German judicial decisions on Indonesian nationalization decree).

has come from legal commentators and textwriters.[7] I hold [fol. 163] that in the circumstances of the present action the law of the forum will not enforce the Cuban decree if it is violative of international law.

The doctrine that courts of this country will not examine the validity of an act of a foreign state insofar as it purports to be effective within the territory of the acting state has its source in our conflict of laws principles. The rule is thus a self-imposed restraint. Even if one were to suppose[8] a requirement of international law that a state afford full faith and credit to the acts of another state, such a requirement clearly would not extend to an act of state which was in violation of international law.[9] Probably the basic reason for judicial refusal to examine the validity of acts of foreign states is a wise recognition of and respect for the

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[7] Restatement, Foreign Relations Law of the United States § 28d(2), comment e. and Reporter's note; 1 Oppenheim, International Law 267-70 (8th ed., Lauterpacht, 1955); Fachiri, Recognition of Foreign Laws by Municipal Courts, 12 Brit. Yr. Bk. Int'l L. 95, 102-106 (1931); E. Lauterpacht, Re Helbert Wagg: A Further Comment, 5 Int'l & Comp. L. Q. 301 (1956); Sir H. Lauterpacht, Case & Comment on The Rose Mary, 1954 Camb. L. J. 20; Mann, Sacrosanctity of Foreign Act of State, 54 L. Q. Rev. 42, 54 id. 155 (1943); Mann, 70 ibid. 181 (1954); Morgenstern, Foreign Acts Contrary to International Law, 4 Int'l L. Q. 326 (1951); Zander, The Act of State Doctrine, 53 Am. J. Int'l L. 826 (1959), supra; Wortley, 33 Grotius Society Transactions 30 (1947); Comment, "Act of State" Doctrine, 58 Mich. L. Rev. 100 (1959); Note, Acts of State and The Conflict of Laws, 35 N.Y.U.L. Rev. 234 (1960), supra; cf. Hyde, Editorial Comment: The Act of State Doctrine and The Rule of Law, 53 Am. J. Int'l L. 635 (1959). Contra, Reeves, Act of State Doctrine and The Rule of Law—A Reply, 54 Am. J. Int'l L. 141 (1960); Lipstein, Case and Comment on The Rose Mary, 1956 Camb. L. J. 138; Seidl-Hohenvelden, Extraterritorial Effects of Confiscations and Expropriations, 49 Mich. L. Rev. 851 (1951).

[8] But see Restatement, Foreign Relations Law of the United States § 28c, comment a. (Tent. Draft No. 4, 1960).

[9] 1 Oppenheim, International Law 267 (8th ed., Lauterpacht, 1955), supra; Fachiri, Recognition of Foreign Laws by Municipal Courts, 12 Brit. Yr. Bk. Int'l L. 95, 103, supra, ("The obligation to apply public international law overrides the ordinary rules of private international law.").

sovereignty of each state within its own territory, the right of each state to conduct its own internal affairs as it wishes. "We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home." Loucks v. Standard Oil Co. of New York, 224 N. Y. 99, 111. The basis for such recognition and respect vanishes, however, when the act of a foreign state violates not what may be our provincial notions of policy but rather the standards imposed by international law.[10] There is an end [fol. 164] to the right of national sovereignty when the sovereign's acts impinge on international law. Judicial refusal to inquire into the validity of an act of a foreign state has also been due to a desire not to embarrass the Executive in its conduct of foreign relations. See Bernstein v. Van Heyghen Freres S. A., 2 Cir., 163 F. 2d 246, cert. den. 332 U. S. 772. The United States State Department has, however, delivered a note to the Cuban Government declaring the very nationalization law which plaintiff seeks to enforce to be in violation of international law.[11] It can scarcely be believed therefore that judicial examination of the decree in the light of international law would embarrass the Executive.

In contrast to the dearth of reasons for refusal to examine the validity under international law of the Cuban decree, the reasons supporting such examination seem to me to be compelling. Plaintiff is not a private litigant who may have acted in good faith reliance on the decree but is the financial agent of the Cuban Government and in my view stands in the shoes of that government in seeking to enforce the nationalization measure in the courts of this

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[10] "[T]he attitude implied in the exercise of the power of excluding foreign law which violates international law is itself of significance. It demonstrates that, however great the respect of courts for the official acts of foreign states may be, that respect is limited by the overriding concern for the authority of international law." Morgenstern, Foreign Acts Contrary to International Law, 4 Int'l L. Q. 326, 344 (1951), supra.

[11] 43 Department of State Bull. 171 (1960). For notes by the United States Government declaring other recent Cuban nationalization measures to be violative of international law, see 42 Department of State Bull. 153 (1960); 43 id. 141 (1960).

country. It is only a short step from the last premise to the conclusion that the Cuban Government is seeking directly the aid of this court in implementing its decree. In such circumstances, it would be almost incomprehensible for the forum to implement a foreign violation of international law (assuming arguendo that the decree is so violative) by extending to the forum the operation of this international wrong. Courts of this country have the obligation to respect and enforce international law not only by virtue of [fol. 165] this country's status and membership in the community of nations but also because international law is a part of the law of the United States, see The Paquete Habana, 175 U. S. 677, 700; U. S. Const. Art. 1, § 8, cl. 10; 1 Oppenheim, International Law 41-2 (8th ed., Lauterpacht, 1955), supra. The conclusion is inescapable that the decree in the present action is subject to examination in the light of the principles of international law. The effective method to promote adherence to the standards imposed by international law is to enforce those standards in municipal courts, particularly in view of the poverty and inadequacy of international remedies.[12] Such enforcement of the standards imposed by international law will undoubtedly also have the healthy result of enhancing respect for the acts of foreign states which are in conformity with international law.

The question for decision is thus whether the nationalization decree violated international law. Both the decree

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[12] The principle that a municipal court will not give effect to a foreign law which violates the rules of public international law "is a principle of importance because it provides, in an international society of which the judicial machinery is endowed with only limited and exceptional jurisdiction, one of the few effective remedies by which a person or company, injured by some act which constitutes a violation of international law, can secure at least partial redress by recourse to the judicial machinery of particular states." E. Lauterpacht, Re Helbert Wagg: A Further Comment, 5 Int'l & Comp. L. Q. 301 (1956), supra. Accord: Report of Committee on International Law of the Association of the Bar of the City of New York, A Reconsideration of the Act of State Doctrine in United States Courts 2 (May, 1959).

and the law pursuant to which it was adopted[13] stated candidly that the expropriations were defensive measures against actions by the United States Government to reduce [fol. 166] the participation of Cuban sugars in the American sugar market.[14]

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[13] Law 851, Official Gazette of Cuba, July 7, 1960.

[14] "EXECUTIVE POWER
RESOLUTION NO. 1

WHEREAS, Law No. 851, of July 6, 1960, published in the Official Gazette of July 7, 1960, authorized the undersigned to provide, through joint resolutions, whenever they—deem it advisable in order to defend the national interests, for the nationalization through compulsory expropriation, of the property or enterprises owned by physical and corporate persons who are nationals of the United States of North America, and the enterprises in which such persons have any interest or participation, even though they have been organized under the Cuban laws.

WHEREAS, the attitude assumed by the Government and the Legislative Power of the United States of North America,—of continued aggression, for political purposes, against the basic interests of the Cuban economy, as evidenced by the amendment to the Sugar Act adopted by the Congress of said country, whereby exceptional powers were conferred—upon the President of said nation to reduce the participation of Cuban sugars in the sugar market of said country, as a weapon of political action against Cuba, was considered as the fundamental justification of said law.

WHEREAS, the Chief Executive of the Government of the—United States of North America, making use of said exceptional powers, and assuming an obvious attitude of economic and—political aggression against our country, has reduced the participation of Cuban sugars in the North American market with the unquestionable design to attack Cuba and its revolutionary process.

WHEREAS, this action constitutes a reiteration of the—continued conduct of the government of the United States—of North America, intended to prevent the exercise of its sovereignty and its integral development by our people—thereby serving the base interests of the North American—trusts, which have hindered the growth of our economy and the consolidation of our political freedom.

WHEREAS, in the face of such developments the undersigned, being fully conscious of their great historical responsibility and in legitimate defense of the national economy, are duty bound to adopt the measures deemed necessary to—counteract the harm done by the aggression inflicted upon our nation,

[footnote continued on next page]

[fol. 167] The Cuban law under which the nationalization decree in issue was enacted was promulgated immediately [fol. 168] after Congress amended the Sugar Act of 1948, 61 Stat. 922, 7 U. S. C. § 1100 et seq., to authorize the President to reduce the sugar quota allotted to Cuba for the remainder of 1960 and through March 31, 1961. See Public

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[Continued from page 143]

WHEREAS, according to our constitutional and legal regime, in the exercise of our sovereignty and as a measure of internal legislation, believing that it is advisable, in the face of the consummation of the aggressive measures referred to in the foregoing clauses, to exercise the powers—vested in the undersigned by Law No. 851, of July 6, 1960,—i.e., to proceed to the compulsory expropriation in favor—of the Cuban State of property and enterprises owned by—juridical persons that are nationals of the United States of North America, as a decision justified by the necessity of our nation to be indemnified for the harm done to its—economy and to affirm the consolidation of the economic independence of the country.

• • •

WHEREAS, the sugar manufacturing companies took possession of the best lands of our country under the protection of the Platt Amendment, an ominous clause designed to permit control of the national economy which facilitated the invasion of—the country by the imperialistic capital of its insatiable and unscrupulous foreign masters who have recovered many—times the value of their investments.

• • •

RESOLVE:

FIRST. To order the nationalization, through compulsory—expropriation, and, therefore, the adjudication in fee simple to the Cuban State, of all the property and enterprises located in the national territory, and the rights and interests resulting from the exploitation of such property and enterprises, owned by the juridical persons who are nationals of the United States of North America, or operators of enterprises in which nationals of said country have a predominating interest, as listed below, to wit:

• • •

22.—Compana Azucarera Vertientes Camaguey de Cuba.

• • •

SECOND. Consequently, the Cuban State is hereby subrogated in the place and stead of the juridical persons listed in the preceding section, in respect of the property, rights and interests aforesaid, and of the assets and liabilities constituting the capital of said enterprises.

[footnote continued on next page]

Law 86-592, July 6, 1960, 74 Stat. 330, 7 U. S. C. § 1158. Secretary of State Christian A. Herter gave the administration's position in support of the measure in hearings before the House Committee on Agriculture.[15] Mr. Herter stated that conferral on the President of the power to reduce the Cuban sugar quota was necessary in the national interest and to insure adequate supplies of sugar. He asserted that Cuba, which had in the past supplied about one-third of the United States' total sugar quota, might not continue to be a dependable supplier of sugar because of her diversification of her economy and the consequent reduction of her sugar acreage and because of her increasing commitments to supply sugar to Communist bloc countries. Because of these and "other circumstances", Mr. Herter declared that "this would be an appropriate time for the United States to seek ways to diversify its sources of supply and reduce [fol. 169] the dependence of its consumers on Cuban sugar, the supply of which" might "become increasingly uncertain." [16] A reading of the legislative history,[17] however, leaves no doubt that the basic reason for the legislation was to impose sanctions on a Government which Congress be-

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[Continued from page 144]

THIRD. It is hereby declared that these compulsory expropriations are carried out for the reasons of public—necessity and national interest referred to in the introductory clauses of this Resolution.

* * * *

SIXTH. The managers so designated [for the nationalized enterprises] are hereby further authorized to proceed to the immediate preventive intervention of the juridical persons, enterprises and property which are subsidiary and appurtenant or associated to those constituting the subject of this Resolution; and once such interventions shall have been effected, such steps shall be reported to the undersigned for proper action."

(The foregoing translation was furnished by plaintiff.)

[15] Hearings before House Committee on Agriculture, on H. R. 12311, H. R. 12534 and H. R. 12624, 86th Cong. 2d Sess., June 22, 1960.

[16] Hearings, op. cit. supra note 15, at 5.

[17] E.g., Hearings, op. cit. supra note 15; 106 Cong. Record 14679-14681, 86th Cong. 2d Sess. (1960).

lieved to be unfriendly and to place in the Executive a bargaining tool to obtain a change in the relations of the Cuban State toward this country. The immediate stimulus for the legislation was an impending deficit of domestic areas in filling their sugar quota, a deficit which would, under existing law, have afforded Cuba the option to supply an additional large amount of sugar above her quota to the United States' sugar market.[18]

On the heels of Congressional conferral of the power on the President, the President issued a proclamation sharply reducing the Cuban sugar quota.[19] Several weeks afterward, the nationalization decree in issue was promulgated,[20] containing a recital that the reason for its "compulsory expropriation in favor of the Cuban State of property and enterprises owned by juridical persons that [fol. 170] are nationals of the United States" was the aggressive acts of the Congress and the President of the United States in reducing the Cuban sugar quota.

The Cuban law of July 6, 1960, pursuant to which the nationalization decree at issue was enacted, was declared by the United States Government to be violative of international law.[21] The facts and law of the case, irrespective

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[18] Thus Senator Long, a manager of the bill, stated: "If we do not pass this bill, the probabilities are that we will do what the State Department most fears and what the administration most fears, and that is that the act we have on the books now, with its mandatory provisions, will force the President to accord Castro a major increase this very month that is out of all accord with logic and reason, with our properties and investments being seized down there, and every indication of unfriendliness from the rulers of that country. However, unless we change the law it would accord a major advantage to an unfriendly government." 106 Cong. Record 14680, 86th Cong. 2d Sess. (1960).

[19] Proclamation No. 3355, July 7, 1960, 25 F. R. 6414.

[20] Executive Power Resolution No. 1, Official Gazette No. 16 (Special Issue) of August 6, 1960, is the manner in which the resolution is cited in a statement in the present action by the Cuban Minister of Foreign Relations, Dr. Carlos Olivares Sanchez.

[21] For the text of the note delivered by the United States Ambassador to Cuba to the Cuban Ministry of Foreign Relations protesting the Cuban Nationalization Law of July 6, 1960, see 43 Department of State Bull. 171 (1960).

of that determination of the Executive, require the same conclusion by the Judicial with regard to the decree.

Expropriation of C.A.V.'s property was not reasonably related to a public purpose involving the use of such property.[22] The taking of the property was not justified by Cuba on the ground that the state required the property for some legitimate purpose or that transfer of ownership of the property was necessary for the security, defense or social good of the state. The taking was avowedly in retaliation for acts by the Government of the United States,[23] and was totally unconnected with the subsequent use of the [fol. 171] property being nationalized. This fact alone is sufficient to render the taking violative of international law.

In addition the present nationalization measure is contrary to the standards of international law because of its discriminatory nature.[24] The act classifies United States nationals separately from all other nationals, and provides no reasonable basis for such a classification. The decree

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[22] See Anglo-Iranian Oil Co., Ltd. v. S.U.P.O.R. Co., Italy, Civil Court of Rome (1954), 1955 Int'l L. Rep. 23, 42, supra: "[T]he Italian Courts must refuse to apply in Italy any foreign law which decrees an expropriation not for reasons of public interest but for purely political, persecutory, discriminatory, racial and confiscatory motives."; McNair, The Seizure of Property and Enterprises in Indonesia, 6 Netherlands Int'l L. Rev. 219, 243-47 (1959).

[23] Whatever the provocation to Cuba of these acts by the United States Government, the acts were not in violation of international law. To assure an orderly and adequate supply of sugar to this country, the Government had since 1934 restricted the inflow of foreign sugar. For this purpose, certain foreign countries had been favored with the privilege of filling part of the quota assigned by the Government in controlling the market in this country. The privilege involved sales of sugar in this country at prices which were most of the time higher than prices received in the world market, see H. R. Rep. 1746, 86th Cong., 2d Sess., at pages 15-16 (Tables 9 and 10), and this privilege could be withdrawn at will.

[24] See, e.g., Anglo-Iranian Oil Co., Ltd. v. S.U.P.O.R. Co., Italy, Civil Court of Rome (1954), 1955 Int'l L. Rep. 23, supra; McNair, op. cit. supra note 22, 6 Netherlands Int'l L. Rev. 219, at 247-49; Doman, Postwar Nationalization of Foreign Property in Europe, 48 Colum. L. Rev. 1125, 1130 (1948).

does not justify the classification on the basis of the conduct of the owners in managing and exploiting their properties or on the basis of the importance to the security of the state where ownership of the property resides. The justification is simply reprisal against another government. Doubtless the measures which states may employ in their rivalries are of great variety but they do not include the taking of the property of the nationals of the rival government.[25]

[fol. 172] Moreover, the nationalization measure in the present action violates international law because it does not provide adequate compensation for the taking of the properties.[26] The decree which expropriated the property of C.A.V. provides no method of compensation, but the law[27] pursuant to which the decree was adopted establishes the method to be applied in the present case. Compensation is to be paid in Cuban Government bonds with a term of not less than 30 years and bearing interest at rates less than

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[25] See Czechoslovak Confiscatory Decree case (American Zone), Court of Appeals of Nuremberg, Germany (1949), 1949 Ann. Dig. 25 (No. 14) (referring to the principle of international law that "no person can be deprived of his property solely on the ground of his nationality"); Anglo-Iranian Oil Co., Ltd. v. S. U. P. O. R. Co., Italy, Civil Court of Rome (1954), 1955 Int'l L. Rep. 23, 40: "[D]iscriminatory laws, enacted out of hatred, against aliens or against persons of any particular race or category or against persons belonging to specific social or political groups cannot be applied in Italy because they run counter to the initially accepted principle of the equality of individuals before the law.

"Such principles, developed by international doctrine, are generally accepted by the jurisprudence of the various countries."; McNair, op. cit. supra note 22, 6 Netherlands Int'l L. Rev. 219, at 247-49; Domke, Indonesian Nationalization Measures Before Foreign Courts, 54 Am. J. Int'l L. 305 (1960) (discussion of decision of Dutch court).

[26] As to the requirement of adequate compensation, see, e.g., 3 Hackworth, Digest of International Law 653-65 (1943); 2 id. 63; 1 id. 21; Harvard Convention on the International Responsibility of States for Injuries to Aliens, Article 10 (Draft No. 11, 1960); McNair, op. cit. supra note 22, at 249-53; 1 Oppenheim, International Law 351-54 (8th ed., Lauterpacht, 1955), supra.

[27] Law 851, Official Gazette of July 7, 1960.

2 per cent per annum. There is, however, a provision that annual interest shall be paid exclusively out of a fund to be set up by the National Bank of Cuba to consist of 25 per cent of the foreign exchange received by Cuba each year from sales of sugar to the United States in excess of 3 million Spanish long tons at a price of not less than 5.75 cents per English pound (free alongside). The bonds are to be amortized out of this same fund and the law authorizes the President of Cuba to determine how and to what extent the bonds will be amortized in a period of not less than thirty years. It is thus unclear from the law whether the bonds will be paid at maturity regardless of the size of the fund. The value of the seized property for the purpose of payment is to be determined by appraisers selected by the President and Prime Minister of Cuba. As is evident from the preceding description of the method for compensation, payment of interest on the thirty year bonds is expressly conditioned on United States sugar purchases from Cuba. Indeed, were the sugar quota for Cuba to be restored tomorrow, contributions to the compensation fund, based on the ten year history of sugar purchases from Cuba before [fol. 173] the year 1960, would be non-existent.[28] The defects in the scheme are, however, more fundamental. The condition placed on the payment of interest on the bonds, as well as the uncertainty of payment at maturity, render the

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[28] From 1950 through 1959, the monthly average price for raw sugar shipments to this country received by Cuba at no time exceeded 5.50 cents per English pound (free alongside). See Report of Committee on Agriculture on the Sugar Act of 1948, H. R. Rep. 1746, 86th Cong. 2d Sess., at page 16 (Table 10) (1960). Yet contributions to the compensation fund would consist only of 25% of the foreign exchange received by Cuba from sugar sales each year to this country at a price not less than 5.75 cents per English pound (f.a.s.). Furthermore, contributions to the fund would only derive from sugar sales each year to the United States in excess of 3 million Spanish long tons. Bearing in mind that a Spanish long ton is equivalent to 2,272 English pounds, it appears from the House Report just cited (at page 5, Table 1), that in only one year from 1950 through 1959 did Cuba sell sugar to this country in an amount exceeding 3 million Spanish tons. In only three years from 1934 through 1959 did Cuba sell this country more than 3 million Spanish tons of sugar.

bonds unmarketable and valueless.[29] Further, the value of the expropriated property is to be determined solely by appraisers appointed by the Cuban Government, an obviously adverse party to the interests of the persons whose property has been seized. Clearly, this is not adequate compensation within the requirements of international law.

Since the Cuban expropriation measure is a patent violation of international law, this court will not enforce it. It follows that C.A.V. owned the sugar which was sold in the present case.

Since plaintiff's motion for summary judgment against defendants Farr Whitlock and the receiver must be denied and there is no issue of fact, summary judgment dismissing the complaint is ordered. Bell v. Waterfront Commission of New York Harbor, D. C. S. D. N. Y., 183 F. Supp. 175, aff'd, 2 Cir., 279 F. 2d 853.

So ordered.

E. J. Dimock, United States District Judge.

Dated: March 31, 1961.

[fol. 174]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

60 Civ. 3929

BANCO NACIONAL DE CUBA

v.

SABBATINO & FARR, WHITLOCK

JUDGMENT—March 31, 1961

On March 31, 1961 an opinion having been filed by the Hon. Edward J. Dimock, D. J. denying plaintiff's motion for summary judgment against Farr, Whitlock and the

[29] See Allison, Cuba's Seizures of American Business, 47 A. B. A. J. 48, 49-50 (1961).

receiver, and granting judgment and dismissing the complaint, it is

Adjudged; That the defendants have judgment against the plaintiff.

Dated: New York, N. Y., March 31, 1961.

Herbert A. Charlson, Clerk.

[fol. 175]

In the United States District Court

For the Southern District of New York

60 Civ. 3929

Banco Nacional De Cuba, Plaintiff,

against

Peter L. F. Sabbatino, as Receiver, and F. Shelton Farr, William F. Prescott, Emet Whitlock, Lawrence H. Dixon, H. Bartow Farr, Elizabeth C. Prescott, Fabio Freyre and Helen G. Downs, co-partners doing business as Farr, Whitlock & Co., Defendants.

Notice of Appeal—April 14, 1961

Sirs:

Please Take Notice that the plaintiff, Banco Nacional De Cuba, hereby appeals to the United States Court of Appeals for the Second Circuit from the order of the United States District Court for the Southern District of New York, entered herein on March 31, 1961, and from the judgment entered thereon, bearing the same date.

Dated, New York, April 14, 1961.

[fol. 176] Rabinowitz & Boudin, By Victor Rabinowitz, Member of the Firm, Attorneys for Plaintiff, 25 Broad Street, New York 4, N. Y.

To:

Choate, Mitchell, Baker & Nelson, Esqs., Attorneys for Defendant, Farr, Whitlock & Co., Office & P. O. Address, 43 Broad Street, New York, N. Y.

Harold L. Fisher and Ross J. DiLorenzo, Esqs., Attorneys for Defendant, Peter L. F. Sabbatino, Office & P. O. Address, 50 Court Street, Brooklyn, N. Y.

[fol. 195]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 226—September Term, 1961.

Argued January 3, 1962

Docket No. 27268

BANCO NACIONAL DE CUBA, Appellant,

v.

PETER L. F. SABBATINO, as Receiver, and F. SHELTON FARR, WILLIAM F. PRESCOTT, EMET WHITLOCK, LAWRENCE H. DIXON, H. BARTOW FARR, ELIZABETH C. PRESCOTT, FABIO FREYRE and HELEN G. DOWNS, co-partners doing business as FARR, WHITLOCK & Co., Appellees.

Before:

WATERMAN, KAUFMAN and MARSHALL,
Circuit Judges.

OPINION—Decided July 6, 1962

Plaintiff-appellant, the financial agent of the Cuban government, brought an action in the United States District Court for the Southern District of New York, alleging that defendant-appellee, Farr, Whitlock & Co., had illegally con-

verted to its own use certain bills of lading and funds received by it that appellant claimed were its property, and also praying that the defendant Sabbatino, as a New York State court-appointed receiver of the assets of a Cuban corporation, Compania Azucarera Vertientes-Camaguey de [fol. 196] Cuba (C. A. V.), be enjoined from exercising any jurisdiction over the funds so claimed to have been converted. The court below, Dimock, *J.*, in a written opinion reported at 193 F. Supp. 375, first held that it had jurisdiction over the subject matter and then granted a summary judgment dismissing the complaint on the ground that plaintiff-appellant's claim of title depended upon the validity of a Cuban expropriation measure which the court found to be a patent violation of international law. Affirmed.

Rabinowitz & Boudin (Victor Rabinowitz, Leonard B. Boudin, Michael B. Standard, Mary Kaufman, of counsel), New York City, for Appellant.

Harold L. Fisher and Ross J. DiLorenzo (Harold L. Fisher, Joseph Slavin, of counsel), Brooklyn, N. Y., for Appellee Sabbatino.

Choate, Mitchell, Baker & Nelson (Robert L. Augenblick, Winthrop S. Emmet, of counsel), New York City, for Appellee Farr-Whitlock.

John G. Laylin, New York City (Covington & Burling, Ky P. Ewing, Jr., R. Markham Ball, Washington, D. C., of counsel), for Cuban-American Sugar Company and Cuban American Sugar Mills Company, *amici curiae*.

WATERMAN, Circuit Judge:

The plaintiff, the financial agent of the Government of Cuba, appeals from a summary judgment entered in the United States District Court for the Southern District of [fol. 197] New York, dismissing its complaint against the defendant Peter L. F. Sabbatino, the New York Temporary Receiver, who is holding the proceeds of a certain shipment of sugar, and against the defendant Farr, Whitlock & Co.,

the commodity broker which negotiated the sale of the sugar in this country, for the conversion of the bills of lading and the sales proceeds of this sugar shipment.

In February and July 1960, Farr, Whitlock entered into contracts with General Sugar Estates, Inc., a wholly-owned Cuban subsidiary of Compania Azucarera Vertientes-Camaguey de Cuba (C. A. V.) for the purchase of Cuban sugar. C. A. V. is organized under the laws of Cuba, but over ninety per cent of its shareholders are residents of the United States. Pursuant to these contracts, between 6:00 A.M. on August 6, 1960, and 1:00 P.M. on August 9, 1960, 22,000 bags of sugar were loaded aboard the German vessel S.S. Hornfels standing offshore at the Cuban port of Jucaro. The exact distance offshore is not known.

On the first day of that loading, August 6, the Castro Government, at the seat of the government in Havana, issued Executive Power Resolution No. 1 under Law No. 851. The resolution proclaimed:

> In pursuance of the powers vested in us, in accordance with the provisions of Law No. 851, of July 6, 1960, we hereby,
>
> RESOLVE:
>
> FIRST: To order the nationalization, through compulsory expropriation, and, therefore, the adjudication in fee simple to the Cuban State, of all the property and enterprises located in the national territory, and the rights and interests resulting from the exploitation of such property and enterprises, owned by the juridical persons who are nationals of the United States of North America, or operators of enterprises in which [fol: 198] nationals of said country have a predominating interest, as listed below, * * *

Followed a list of the twenty-six companies to be seized, number 22 on the list being C. A. V. The purpose of Law No. 851 and the resolution of expropriation was set forth in the resolution as follows:

> WHEREAS, Law No. 851, of July 6, 1960, published in the Official Gazette of July 7, 1960, authorized the

undersigned to provide, through joint resolutions, whenever they deem it advisable in order to defend the national interests, for the nationalization through compulsory expropriation, of the property or enterprises owned by physical and corporate persons who are nationals of the United States of North America, and the enterprises in which such persons have any interest or participation, even though they have been organized under the Cuban laws.

WHEREAS, the attitude assumed by the Government and the Legislative Power of the United States of North America, of continued aggression, for political purposes, against the basic interests of the Cuban economy, as evidenced by the amendment to the Sugar Act adopted by the Congress of said country, whereby exceptional powers were conferred upon the President of said nation to reduce the participation of Cuban sugars in the sugar market of said country, as a weapon of political action against Cuba, was considered as the fundamental justification of said law.

WHEREAS, the Chief Executive of the Government of the United States of North America, making use of said exceptional powers, and assuming an obvious attitude of economic and political aggression against our country, has reduced the participation of Cuban sugars in the North American market with the unquestionable design to attack Cuba and its revolutionary process.

WHEREAS, this action constitutes a reiteration of the continued conduct of the government of the United States of North America, intended to prevent the exer- [fol. 199] cise of its sovereignty and its integral development by our people thereby serving the base interests of the North American trusts, which have hindered the growth of our economy and the consolidation of our political freedom.

WHEREAS, in the face of such developments the undersigned, being fully conscious of their great historical responsibility and in legitimate defense of the national economy are duty bound to adopt the measures

deemed necessary to counteract the harm done by the aggression inflicted upon our nation.

After August 6 the consent of the Cuban government was required before sugar-carrying ships could leave Cuban waters. To obtain this consent, on August 11 Farr, Whitlock entered into contracts with Banco Para el Commercio Exterior de Cuba, as the representative of the Castro government. The terms of these contracts were identical with those in the earlier contracts between Farr, Whitlock and the subsidiary of C. A. V. With the permission of the Cuban regime the sugar-laden S.S. Hornfels sailed for its destination, Casablanca, Morocco.

Banco Para el Commercio Exterior assigned the bills of lading for this sugar shipment to the plaintiff, which in turn sent them to Societe Generale, a French bank which acted as the plaintiff's agent in New York. The plaintiff instructed Societe Generale to deliver the bills of lading and a sight draft in the sum of $175,250.69 to Farr, Whitlock in return for payment of the draft. On August 26, 1960, as instructed, Societe Generale presented the documents to Farr, Whitlock for payment, but the broker refused to accept them, giving as its reason the fact that one of the three necessary copies of the shipping documents was missing.

Meanwhile, on August 16, a shareholder of C. A. V. brought an action in the New York Supreme Court, Kings [fol. 200] County, pursuant to N. Y. Civ. Prac. Act §977-b for the appointment of a receiver for the assets of C. A. V. in New York.[1] That same day the New York court *ex parte* appointed the present defendant Sabbatino as Temporary

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[1] N. Y. Civ. Prac. Act. §977-b provides in pertinent part:

§977-b. Receivers to liquidate local assets of foreign corporations. 1. An action may be instituted in the supreme court for the appointment of a receiver of the assets in this state of a foreign corporation, whenever such foreign corporation has assets or property of any kind whatsoever, tangible or intangible, within the state of New York, and (a) it has heretofore been or is hereafter dissolved, liquidated or nationalized • • •

Receiver. A certified copy of the order appointing the Temporary Receiver was served on Farr, Whitlock on August 23.

On Friday, August 26, the same day on which Societe Generale first tried to make delivery of the shipping documents and receive payment for the plaintiff, officers of C. A. V. advised Farr, Whitlock orally and in writing that C. A. V., not the Cuban government or its agencies, was the true owner of the sugar covered by the bills of lading in the hands of Societe Generale.[2] C. A. V. enclosed in its letter to Farr, Whitlock a notice of the appointment of the Temporary Receiver. Later that day Farr, Whitlock and C. A. V. entered into an agreement by which Farr, Whitlock promised to retain any proceeds it might receive from the sugar shipment here involved until it was compelled by a court order to turn them over to the Receiver or anyone else. C. A. V. promised to indemnify Farr, Whitlock against any claims with respect to the sugar, except a claim by the Receiver; to defend any suit against Farr, Whitlock involving the sugar or the proceeds therefrom, except a proceed-[fol. 201] ing by the Receiver; and to pay Farr, Whitlock ten per cent of the sum of $175,000 if C. A. V. ever obtained that sum.

Monday morning, August 29, 1960, Societe Generale again presented the draft to Farr, Whitlock, this time with all the necessary documents. The plaintiff claims that Farr, Whitlock informed Societe Generale that it would take the documents for inspection and that a representative of the French bank might return later that day for payment. Farr, Whitlock claims, on the other hand, that Societe Generale presented the documents in the usual manner and that no conversation took place. In either event, the same day Farr, Whitlock negotiated the bills of lading to its customer and received payment of the purchase price in the amount of $175,250.69.

A representative of Societe Generale returned to Farr, Whitlock's office at 3:00 P. M. that day to receive payment

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[2] It is not clear whether Societe Generale on August 26 presented documents to Farr, Whitlock before or after C. A. V.'s warning to Farr, Whitlock on that day.

of the draft. He was informed, the plaintiff maintains, that the bills of lading had been negotiated and that Farr, Whitlock had received the proceeds but that it would not turn over the proceeds to Societe Generale because C. A. V. claimed them.

About two hours later Farr, Whitlock was served with an order of the Supreme Court of New York, Kings County, enjoining it from taking any action which might result in removing assets claimed by C. A. V. out of the State of New York. That same day Farr, Whitlock notified the French bank by letter that the sugar broker had notice of the appointment of the receiver for C. A. V.'s New York assets, that C. A. V. claimed the sugar proceeds here involved, that the broker had received formal notification of a motion in the New York court to vacate the receivership,[3] and that Farr, Whitlock had been served with the [fol. 202] order mentioned in the preceding sentence. Therefore, the letter stated, Farr, Whitlock was obliged to retain the proceeds until directed by a competent court to give them up. Societe Generale formally protested the non-payment of the draft.

On October 24, 1960, the Supreme Court of New York, Kings County, ordered Farr, Whitlock to transfer the proceeds less $1,314.38, commissions due the broker, or a total of $173,936.31, to Sabbatino, the Temporary Receiver, to await the court's determination as to the rightful owner of the proceeds. The commodity broker transferred the proceeds as the state court ordered.

The plaintiff filed its complaint in the present action in the United States District Court for the Southern District of New York on October 10, 1960, and amended it on October 31 in the light of the New York court's order of October 24, referred to in the preceding paragraph. In the amended complaint, the Cuban bank alleged that Farr, Whitlock's refusal either to return the bills of lading or to pay over the proceeds of the sale to Societe Generale was a conversion of the bills and of the proceeds. The

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[3] This motion was subsequently denied by the New York court. See *Schwartz* v. *Compania Azucarera Vertientes-Camaguey de Cuba*, 12 A. D. 2d 506, 207 N. Y. S. 2d 288 (1960).

plaintiff asked the federal court to enter judgment for it against Farr, Whitlock in the amount of $175,250.69 and to enjoin Sabbatino from exercising jurisdiction over the sums paid to him.

The defendant Farr, Whitlock answered, and filed a cross-claim for judgment over against the defendant Sabbatino in the amount of $173,936.31, being the sum which the broker had paid to the Receiver, should the plaintiff recover judgment against Farr, Whitlock. The commodity broker also raised a counterclaim in the amount of $412,807.12 based on an unrelated shipment of Cuban sugar.

Sabbatino moved to dismiss the plaintiff's complaint as to him and the broker's cross-claim for failure to obtain permission to sue him from the court which appointed the [fol. 203] Receiver. Farr, Whitlock moved to dismiss the Cuban bank's action against it because of alleged lack of jurisdiction over the subject matter. The plaintiff moved for summary judgment against both defendants. Farr, Whitlock moved for summary judgment against the Receiver in the event that the plaintiff obtained summary judgment against Farr, Whitlock. The district court below treated all these motions in a single, scholarly opinion, reported at 193 F. Supp. 375 (1961). It denied the broker's motion to dismiss, holding that it had jurisdiction over the subject matter and, on the plaintiff's motion for summary judgment, granted judgment for the defendants, thereby rendering the other motions moot. The plaintiff then appealed to this court.

Inasmuch as they are presently involved in several cases with issues similar to those in this case, we allowed the Cuban-American Sugar Company and its wholly-owned subsidiary, the Cuban American Sugar Mills Company, to file a brief as *amici curiae*.

This appeal raises very important and difficult legal questions in the fields of international relations, state-federal relations, and judicial-executive relations.

In its complaint the plaintiff invoked federal jurisdiction on the basis of diversity of citizenship between itself and the defendants, 28 U. S. C. §1332, and on the basis of the presence of a federal question 28 U. S. C. §1331. As the plaintiff is a Cuban corporation and the defendants are

citizens of New York, New Jersey, and Florida, the diversity jurisdiction of the federal court was established. We need not decide whether jurisdiction could have also been grounded on the federal question jurisdiction of the district court.

But Farr, Whitlock contends that the jurisdiction of the federal court was defective in another respect. Because a court without jurisdiction has no power to adjudicate upon [fol. 204] the merits of a controversy, the first question to be resolved in an orderly consideration of the numerous questions raised in this litigation is whether the court below was correct in denying Farr, Whitlock's motion to dismiss the complaint against it on the ground that the federal court lacked jurisdiction over the subject matter. Farr, Whitlock's motion was based on the proposition that, as the proceeds of the sale had been turned over to a New York state court and as that court had perfected its jurisdiction either *in rem* or *quasi in rem* over those proceeds before the U. S. District Court had perfected its jurisdiction over the parties, the U. S. District Court lacked jurisdiction over the subject matter. See *Penn Gen. Cas. Co.* v. *Pennsylvania*, 294 U. S. 189, 196 (1935); *Harkin* v. *Brundage*, 276 U. S. 36, 43-45 (1928). It has long been established that the court which first obtains jurisdiction over a particular *res* is entitled to retain that jurisdiction to the exclusion of other courts. See *Hagan* v. *Lucas*, 35 U. S. (10 Pet.) 400 (1836); *Taylor* v. *Carryl*, 61 U. S. (20 How.) 583, 597 (1858); *Freeman* v. *Howe*, 65 U. S. (24 How.) 450 (1861); Hart & Wechsler, The Federal Courts and The Federal System 1073 (1953).

But if the action brought in the federal court is an *in personam* action that does not interfere with the state court's jurisdiction over the fund it holds, the federal court has jurisdiction to adjudicate the rights of the parties. *United States* v. *Bank of New York & Trust Co.*, 296 U. S. 463, 477 (1936); *Stanton* v. *Embrery*, 93 U. S. (3 Otto) 548 (1877). This is so even if the issues in the state court case and in the federal court case are identical. The rule is well stated in the leading case of *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 230 (1922), where both relevant actions were *in personam* actions:

> But a controversy is not a thing, and a controversy over a mere question of personal liability does not in-
> [fol. 205] volve the possession or control of a thing, and an action brought to enforce such a liability does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending. Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principles of *res adjudicata* by the court in which the action is still pending in the orderly exercise of its jurisdiction, as it would determine any other question of fact or law arising in the progress of the case. The rule, therefore, has become generally established that where the action first brought is *in personam* and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded.

For cases applying this rule where an *in rem* or *quasi in rem* action preceded an *in personam* one see *Markham* v. *Allen*, 326 U. S. 490 (1945) (state action followed by federal one); *United States* v. *Klein*, 303 U. S. 276 (1938) (federal action followed by state one); *Commonwealth Trust Co.* v. *Bradford*, 297 U. S. 613 (1936) (state action followed by federal one).

The plaintiff in the present case in an *in personam* action seeks a money judgment for damages against Farr, Whitlock for conversion. The fund in the hands of the New York state court need not be interfered with by a judgment for the plaintiff against Farr, Whitlock personally. Therefore, the state court's control of the sale proceeds has not preempted the jurisdiction of the federal court over the subject matter of the present litigation, and the court below was correct in holding that it had jurisdiction to decide the controversy between the parties.

[fol. 206] Farr, Whitlock further contends, however, that even if the federal district court for the Southern District of New York did have jurisdiction to decide this case, it

should have, in its sound discretion, in view of the pending state court litigation, abstained from entering a judgment. But the Supreme Court has announced:

> The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest. (*County of Allegheny* v. *Frank Mashuda Company*, 360 U. S. 185, 188-89 (1959).)

Abstention has been approved when it permits the federal court to avoid reaching a decision of constitutional magnitude, or when state court determination of relevant issues of state law would present the federal constitutional issue in a different posture. *City of Meridian* v. *Southern Bell Tel. & Tel. Co.*, 358 U. S. 639 (1959); *Leiter Minerals, Inc.* v. *United States*, 352 U. S. 220 (1957); *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U. S. 101 (1944); *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496 (1941). It has also been approved when decision by the federal court would unduly strain the relationship between the state and federal jurisdictions. See, e.g., *Burford* v. *Sun Oil Co.*, 319 U. S. 315 (1943); *Alabama Pub. Serv. Comm'n* v. *Southern Ry.*, 341 U. S. 341 (1951). But the mere adjudication by a federal court of a particular issue identical with an issue involved in pending litigation in a state court has never been considered so irritable to state prerogatives as to con- [fol. 207] stitute a ground for federal abstention, even though the proceeding in the state court became truncated through an application of the rules of *res judicata* or collateral estoppel. Moreover, as this controversy involves our national foreign affairs, it is certainly appropriate for its determination to be made on the merits by a court of the United States. The court below properly exercised its

discretion in declining to abstain from its duty of adjudication.[4]

Since the federal court had jurisdiction to decide the merits of the controversy between the Cuban national bank and Farr, Whitlock, we now come to a consideration of those merits. The substantive issues raised by the plaintiff's claims against the state-court-appointed receiver are identical with those raised against Farr, Whitlock. As we have jurisdiction to adjudicate those substantive issues, we find it unnecessary and unwise at this time, in light of the decision we reach on the merits, to go into the question of the power of a federal court to enjoin a state appointed receiver.

As federal court jurisdiction over the present case rests upon the diversity of citizenship of the parties, we look, initially at least, to the law of the State of New York to determine the litigants' rights. To recover judgment on a theory of conversion, the plaintiff must establish title, possession or right to possession, or some property interest in the subject matter which plaintiff claims the defendants converted to their own use and which provides the basis for the lawsuit. *Kaufman* v. *Simons Motor Sales Co.*, 261 N. Y. 146, 184 N. E. 739 (1933); *Johnson* v. *Blaney*, 198 N. Y. 312, 91 N. E. 721 (1910). Since the plaintiff's alleged rights in the bills of lading and in the proceeds received from the sugar depend upon plaintiff's prior ownership of the sugar [fol. 208] the determination of whether Farr, Whitlock is a converter depends upon whether C. A. V. or the Government of Cuba owned the sugar when it left Cuba. Under the ordinary rules of conflict of laws, title to this sugar would be determined by the law of Cuba, namely, the decree of expropriation of August 6, 1960.[5] See Restatement, Conflict of Laws §260 (1934); cf. *M. Salimoff & Co.* v. *Standard Oil*

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[4] Since Farr, Whitlock has an indemnification agreement with C. A. V., it is unlikely that Farr, Whitlock will suffer a double liability.

[5] We assume that the district court below was correct in concluding that C. A. V. had an interest in the sugar on the date of the expropriation decree and that the sugar was in Cuban territorial waters on that date.

Co., 262 N. Y. 220, 186 N. E. 679 (1933). The appellees, however, attack this decree as invalid under (1) the municipal law of Cuba, (2) the public policy of the forum, and (3) the rules and principles of international law.

The appellant, on the other hand, asserts that irrespective of the appellees' contentions as to the status of the expropriation decree we must decide in appellant's favor because under the Act of State Doctrine this court may not inquire into the validity of the Cuban decree. The Act of State Doctrine, briefly stated, holds that American courts will not pass on the validity of the acts of foreign governments performed in their capacities as sovereigns within their own territories. The actions of foreign nations accorded this respect may be executive, legislative, or judicial in nature, although court judgments, because they ordinarily involve the resolution of private disputes and do not ordinarily reflect high state policy, do not usually come within this category. Restatement, Foreign Relations Law of the United States §41, comment c (Proposed Official Draft, 1962). This doctrine is one of the conflict of laws rules applied by American courts; it is not itself a rule of international law. *Id.*, comments b, g; Zander, *The Act of State Doctrine*, 53 Am. J. Int'l L. 826, 837, 844 (1959). *But see* Falk, *Toward a Theory of the Participation of* [fol. 209] *Domestic Courts in the International Legal Order: a Critique of Banco Nacional de Cuba* v. *Sabbatino*, 16 Rutgers L. Rev. 1, 34-35 (1961).* The act of state doctrine

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* The act of state doctrine appears to be well established among British courts. See *Blad* v. *Bamfield*, 3 Swans. 604, 36 Eng. Rep. 992 (Ch. 1674); *A. M. Luther* v. *James Sagor & Co.*, [1921] 3 K.B. 532 (C.A.); *Princess Paley Olga* v. *Weisz*, [1929] 1 K.B. 718 (C.A.); Re, Foreign Confiscations in Anglo-American Law 128-40 (1951).

Elsewhere, however, courts have been more willing to inquire into the legality of steps taken by foreign sovereigns. *Anglo-Iranian Oil Co.* v. *S. U. P. O. R. Co.*, Civil Court of Rome, Sept. 13, 1954, [1955] Foro Italiano I. 256, [1955] Int'l L. Rep. 23, 49 Am. J. Int'l L. 259 (1955). *Compare Societe Potasas Ibericas* v.

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* *But see Anglo-Iranian Oil Co.* v. *Joffrate*, [1953] Int'l L. Rep. 316, 47 Am. J. Int'l L. 325 (Supreme Court of Aden); Fawcett, *supra* note 7, at 375.

[fol. 210] stems from the concept of the immunity of the sovereign because "the sovereign can do no wrong." See Note, *The Castro Government in American Courts: Sovereign Immunity and the Act of State Doctrine*, 75 Harv. L. Rev. 1607, 1608 (1962).

The act of state doctrine has had a place in American jurisprudence for a very long time. It may date from the Supreme Court's decision in *Hudson* v. *Guestier*, 8 U. S. (4

Black, Supreme Court (France), March 14, 1939, [1939] Dalloz I. 257, [1938-1940] Ann. Dig. 152 (No. 54); *Union des Republiques Socialistes Sovietiques* v. *Intendant General Bourgeois Es-Qualite et Societe La Ropit*, Supreme Court (France), March 5, 1928, Sirey I. 217, [1927-1928] Ann. Dig. 67 (No. 43); *and Volatron* v. *Moulin*, Court of Appeal of Aix, March 25, 1939, [1939] Dalloz I. 329, [1938-1940] Ann. Dig. 24 (No. 10), *with Societe Hardmuth*, Court of Appeal of Paris, Dec. 2, 1950, 44 Rev. Cr. Dr. Int. Priv. 501 (1955); *De Keller* v. *Maison de la Pensee Francaise*, Tribunal of La Seine, July 12, 1954, 44 Rev. Cr. Dr. Int. Priv. 503 (1955), [1954] Int'l L. Rep. 21, 49 Am. J. Int'l L. 585 (1955); *Martin* v. *Banque d'Espagne*, Supreme Court (France), Nov. 3, 1952, 42 Rev. Cr. Dr. Int. Priv. 425 (1953), [1952] Int'l L. Rep. 202 (No. 42); *Larrasquitu et l'Etat Espagnol* v. *Societe Cementos Rezola*, Court of Appeal of Poitiers, Dec. 20, 1937, [1938] Sirey III. 68, [1935-1937] Ann. Dig. 196 (No. 70). *Compare Prince Dabischa-Kotromaniez* v. *Societe Lepke*, Tribunal of Berlin, Nov. 1, 1928, 56 Clunet 184 (1929), *with* Domke, Indonesian Nationalization Measures Before Foreign Courts, 54 Am. J. Int'l L. 305, 318-19 (1960). *Compare Senembah Mattschappij N.V.* v. *Republiek Indonesie Bank Indonesia and De Twentsche Bank N.V.*, District Court of Appeals of Amsterdam, reported in Domke, *supra* at 307-08, *with United States of Mexico* v. *Batafsche Petroleum Maatschappij*, District Court of Middleburg, Aug. 2, 1938, [1938] W. & N.J. No. 790, [1919-1942] Ann. Dig. 16 (No. 7); *Petroservice & Credit Minier Franco-Roumain* v. *El Aguila*, Court of Appeals of The Hague, Dec. 4, 1939, [1939] W. & N.J. No. 115, aff'd on other grounds, Feb. 7, 1941, [1941] W. & N.J., [1919-1942] Ann. Dig. 17; *and Dairs et Cy.* v. *El Aguila*, District Court of Rotterdam, July 31, 1939, [1939] W. & N.J. No. 747, [1919-1942] Ann. Dig. 19. *But see Propetrol, Petroservice, et Petrolet* v. *Compania Mexicano de Petroleo*, Civil Tribunal of Antwerp, Feb. 21, 1939, [1939] Belgique Judicaire II. 12, [1938-1940] Ann. Dig. 25 (No. 11); *Davis et Cie* v. *Compania de Petroleo*, Court of Appeal of Rotterdam, 41 Bull. Inst. Jur. Int. 256 (1939), [1938-1940] Ann. Dig. 25 (No. 12); *Hungarian Soviet Government*, Supreme Court of Austria, Oct. 31, 1922 (Ob. I. 1055/22), [1922] 4 E.O.G.Z. 274 (No. 10), [1919-1922] Ann. Dig. 56 (No. 31).

Cranch) 293 (1808), in which the Court held that it could not review the correctness of a seizure by a foreign power within the territorial jurisdiction of that sovereign "unless the court passing the sentence loses its jurisdiction by some circumstance which the law of nations can notice."

The first case in the Supreme Court clearly to recognize the doctrine was *Underhill* v. *Hernandez*, 168 U. S. 250 (1897). In that case the plaintiff sued the commander of a revolutionary army in Venezuela for damages suffered from an alleged false imprisonment and assault perpetrated by the defendant's soldiers during Venezuelan hostilities. The United States subsequently recognized the revolutionary government under which the defendant acted. The Supreme Court refused to consider the plaintiff's contentions on the merits. The Court stated:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts [fol. 211] must be obtained through the means open to be availed of by sovereign powers as between themselves (*Id.* at 252).

Another case in the history of the act of state doctrine was the well-known opinion of Mr. Justice Holmes in *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347 (1909). The plaintiff alleged that the defendant conspired with the Government of Costa Rica to deprive the plaintiff of its plantation and railroad in that country. As in *Underhill*, the Court refused to entertain the plaintiff's substantive contentions. Mr. Justice Holmes, for the Court, explained that a sovereign within its territorial jurisdiction could not itself commit an unlawful act because the sovereign's act within its own boundaries was the law there.[7]

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[7] The Justice stated:

> [I]t is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring

The Supreme Court further developed the doctrine in two decisions rendered in 1918. In *Oetjen* v. *Central Leather Co.*, 246 U. S. 297 (1918) the plaintiff, a citizen of Mexico, sought to replevy certain hides which Pancho Villa as General Carranza's "Commander of the North" had seized from the plaintiff during the Mexican Civil War of 1913 and later had sold to the defendant. The Court refused to grant relief to the plaintiff for several reasons: the foreign relations of the United States were committed to the legislative and executive branches of the Government, recognition of Carranza's government *de jure* validated all its acts from the beginning of its existence, the [fol. 212] sovereignty of a foreign government must be respected within its jurisdiction, and reexamination of the acts of one nation's government within its own territorial limits by the courts of another nation would interfere with friendly relations between governments. The Court relegated the plaintiff to whatever remedies he might have in the courts of Mexico or to whatever results he might obtain by diplomatic negotiation. Toward the end of its opinion the Court stated:

> It is not necessary to consider, as the New Jersey court did, the validity of the levy of the contribution made by the Mexican commanding general, under rules of international law applicable to the situation, since the subject is not open to reexamination by this or any other American court (*Id.* at 304).

The other case of that year was *Ricaud* v. *American Metal Co.*, 246 U. S. 304, (1918). Another one of Carranza's generals had seized a large consignment of lead bullion from a Mexican mining company and had sold it to the defendants. Claiming that he had purchased the bullion from the mining company prior to the seizure, the plaintiff, an

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about a result that it declares by its conduct to be desirable and proper. It does not, and foreign courts cannot, admit that the influences were improper or the results bad. It makes the persuasion lawful by its own act. The very meaning of sovereignty is that the decree of the sovereign makes law (213 U. S. at 358).

American citizen, sought to recover it from the defendant. For virtually the same reasons as it had stated in *Oetjen* v. *Central Leather Co., supra*, the Supreme Court denied the relief which the plaintiff sought.[8]

[fol. 213] The act of state doctrine has been recognized and applied by this and other courts. See e.g., *Republic of Cuba* v. *Pons*, 294 F. 2d 925 (D. C. Cir. 1961), *cert. denied*, 368 U. S. 960 (1962); *Bernstein* v. *Van Heyghen Freres Societe Anonyme*, 163 F. 2d 246 (2 Cir.), *cert. denied*, 332 U. S. 772 (1947); *United States ex rel. Von Heyman* v. *Watkins*, 159 F. 2d 650 (2 Cir. 1947); *Banco de Espana* v. *Federal Reserve Bank*, 114 F. 2d 438 (2 Cir. 1940); *The Claveresk*, 246 Fed. 276 (2 Cir. 1920); *Hewitt* v. *Speyer*, 250 Fed. 367 (2 Cir. 1919); *Eastern States Petroleum Co.* v. *Asiatic Petroleum Corporation*, 28 F. Supp. 279 (S. D. N. Y. 1939); *M. Salimoff & Co.* v. *Standard Oil Co.*, 262 N. Y. 220, 186 N. E. 679 (1933); *Holzer* v. *Deutsche Reichbahn-Gesellschaft*, 277 N. Y. 474, 14 N. E. 2d 798 (1938); *Dougherty* v. *Equitable Life Assur. Co.*, 266 N. Y. 71, 193 N. E. 897 (1934).

The policies and theories underlying this doctrine of judicial abnegation seem to be these: The desire by the judiciary to avoid possible conflict with or embarrassment to the executive and legislative branches of our Govern-

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[8] Another Supreme Court decision should be mentioned in this respect, *Shapleigh* v. *Mier*, 299 U. S. 468 (1937). That case involved a dispute over title to a tract of land which had formerly been part of Mexico but which had become part of the United States as a result of a change in the course of the Rio Grande River. While under its sovereignty the Mexican state of Chihuahua had expropriated the land in question. At the outset of its opinion in *Shapleigh* the Supreme Court stated:

> The question is not here whether the proceeding was so conducted as to be a wrong to our nationals under the doctrines of international law, though valid under the law of the situs of the land. For wrongs of that order the remedy to be followed is along the channels of diplomacy (299 U. S. at 471).

The Court found it unnecessary to decide whether it could examine the validity of the expropriation under Mexican law because the plaintiff had failed to establish what that law was on the point at issue.

ment in our dealings with foreign nations, see e.g., *Wulfsohn* v. *Russian Socialist Federated Soviet Republic*, 234 N. Y. 372, 138 N. E. 24 (1923); a positivistic concept of territorial sovereignty, see e.g., *American Banana Co.* v. *United Fruit Co., supra;* and a fear of hampering international trade by rendering titles insecure, see e.g., *Banco de Espana* v. *Federal Reserve Bank, supra.* It has also been suggested that the remoteness of American courts from the circumstances surrounding the making of the foreign decree and the provincial attitude taken by most municipal [fol. 214] courts make American courts unsuitable tribunals for judging the validity of acts committed by foreign sovereigns within their territorial limits. See Reeves, *Act of State Doctrine and the Rule of Law—A Reply*, 54 Am. J. Int'l L. 141, 144-48 (1960); Falk, *supra* at 10. See, generally, Zander, *The Act of State Doctrine*, 53 Am. J. Int'l L. 826, 834 (1939); Falk, *supra* at 31-32.

However, when the executive branch of our Government announces that it does not oppose inquiry by American courts into the legality of foreign acts, an exception to the judicial abnegation required by the act of state doctrine has arisen and has been recognized both in this circuit and elsewhere. In *Bernstein* v. *N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F. 2d 375 (2 Cir. 1954) (*per curiam*), when we received word from the State Department that it was State Department policy to permit American courts to pass on the validity of acts done by Nazi officials, our court rescinded its earlier mandate based upon the act of state doctrine, preventing the district court from questioning the validity of the acts of the German Nazi government. See 173 F. 2d 71 (2 Cir. 1949). See also *Bernstein* v. *Van Heyghen Freres, S.A.*, 163 F. 2d 246, 252 (2 Cir.), *cert. denied*, 332 U. S. 772 (1947); Restatement, Foreign Relations Law of the United States §44 (Proposed Official Draft, 1962); *Kane* v. *National Institute of Agrarian Reform*, No. 61 L. 730, June 8, 1961 (Fla. Cir. Ct.); Association of the Bar of the City of New York, Committee on International Law, *Report, A Reconsideration of the Act of State Doctrine in United States Courts* 13 (May 1959); Zander, *The Act of State Doctrine*, 53 Am. J. Int'l L. 826 (1959).

This exception is applicable to the case before us. While the case has been pending we have been enlightened, as the court was in the *Bernstein* case, *supra*, as to the at- [fol. 215] titude of the Department of State. In a letter, dated October 18, 1961, addressed to counsel for the *amici* in this case, the Legal Adviser to the State Department asserted:

> "The Department of State has not, in the *Bahia de Nipe* case or elsewhere, done anything inconsistent with the position taken on the Cuban nationalization by Secretary Herter. *Whether or not these nationalizations will in the future be given effect in the United States is, of course, for the courts to determine.* Since the *Sabbatino* case and other similar cases are at present before the courts, any comments on this question by the Department of State would be out of place at this time. As you yourself point out, statements by the executive branch are highly susceptible of misconstruction." (Emphasis added.)

In a subsequent letter, dated November 14, 1961, the Under Secretary of State for Economic Affairs stated:

> "I have carefully considered your letter and have discussed it with the Legal Adviser. Our conclusion, in which the Secretary concurs, is that the Department should not comment on matters pending before the courts."

On April 13, 1961, the State Department told the litigants in *Kane* v. *National Institute of Agrarian Reform*, No. 61 L. 730 (Fla. Cir. Ct.) (1961), a case that involved another confiscation by the Castro Cuban government of American-owned property in Cuba: "Effect in U. S. of Decrees, etc. of Castro regime is question for court in which case heard." These statements are somewhat ambiguous, perhaps intentionally so. But at the least they express a belief on the part of those responsible for the conduct of [fol. 216] our foreign affairs that the courts here should decide the status here of Cuban decrees. Of course, if there is no good reason for abstention, a court should recognize

and accept its fundamental responsibility to decide a case before it in accordance with whatever substantive norms may be relevant; and when, as here, the State Department is willing for the court to adjudicate the rights of the parties, one of the basic reasons for the act of state doctrine—the danger that independent judicial decisions might interfere with this country's foreign relations—is inapplicable to support abstention. The broad statements in cases such as *Oetjen* v. *Central Leather Co.*, 246 U. S. 297 (1918) and *Shapleigh* v. *Mier*, 299 U. S. 468 (1937) could not have been intended by the Supreme Court to require a judicial avoidance of judicial responsibility in a case where the State Department has expressed a lack of concern as to the outcome of the litigation.

But even though we perceive no danger to American foreign policy from a determination by an American court of the merits of this litigation presently before us, perhaps there is some other ground that compels us to accept without question the validity of the Cuban decree here involved. With this in mind we turn to a consideration of the appellees' three-pronged attack upon the validity of that decree of expropriation. The appellees first claim that the decree is invalid under the law of Cuba because the Cuban government failed to comply with the formal requisite of its publication in the Official Gazette of Cuba. But in *American Banana Co.* v. *United Fruit Co.*, *supra*, and other similar cases, it was apparently held that the acts of a foreign sovereign could not be invalid under its own law. Therefore, we will reject the appellees' contention, based upon Cuban law, that we should hold the decree ineffective because of a claimed invalidity under that law.

[fol. 217] Also, we decline to adopt appellees' second contention, that this court should not enforce the Cuban decree because it is contrary to American public policy. Judge (later Justice) Cardozo in his famous opinion in *Loucks* v. *Standard Oil Co.*, 224 N. Y. 99, 120 N. E. 198 (1918), defined the type of local public policy which requires that the forum not enforce a foreign created right. He said:

> "The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the

individual notion of expediency or fairness. They do not close their doors, unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal" (*Id.* at 111).

The right to just compensation in return for property taken by the government is certainly well established in American jurisprudence. It is even protected by the Constitution, Amend. V. Therefore, it is likely that any taking of one's property without provision for adequate compensation is contrary to the public policy of this forum, as Cardozo, *J.* defined that concept. See *Vladikavkazsky Ry.* v. *New York Trust Co.*, 263 N. Y. 369, 189 N. E. 456 (1934). But we are aware of the admonition that public policy is an "unruly horse." The concept has proved to be a very difficult one to confine when one seeks to apply it. We are not entirely certain what the American public would consider to be the proper policy of the United States with respect to expropriation of the property of aliens by foreign sovereigns when the property has its situs within the foreign countries. Also, decision of this case based upon the public policy of this forum is undesirable because reliance upon such a basis for decision results in a nationalistic, or municipal, solution of a problem that is [fol. 218] clearly international. See Zander, *supra* at 848. Finally, inasmuch as the decision in the present case is reachable by taking advantage of an exception to the long-established act of state doctrine, we find it wiser, when given the opportunity of relying upon alternative grounds for decision, to base our result on the ground which appears to us to be the narrower exception to that doctrine.

Thus we turn to a consideration of the appellees' third contention, that the appellant's title is invalid under international law. Although the law of nations is a hazy concept, its rules are more limited in scope than are the public policy concepts of a particular nation within the family of nations. Moreover, if we apply international law to the present case, we find that the reasons put forward in support of the act of state doctrine are either inapplicable or insufficient to preclude us from inquiring into the

validity of the Cuban decree on the limited basis of an inquiry as to the decree's consistency with international rules of law. First, as pointed out earlier in the opinion, the State Department has no desire to interfere here with independent decision by the judiciary. Second, the very proposition that something known as international law exists carries with it the implication that national sovereignty is not absolute but is limited, where the international law impinges, by the dictates of this international law. Eagleton, Responsibility of States in International Law 65 (1928). See Sohn & Baxter, Convention on State Responsibility art. 2 (Draft No. 12, 1961). Third, when an agency of the expropriating country instead of some third party is the litigant relying upon the expropriation for its title, the problem of preserving the security of the titles to property that is the subject of international trade is not presented. See Falk, *supra* at 15. Fourth, this court is not so unfamiliar with the legal, political, and social [fol. 219] circumstances surrounding the Castro government's seizure of C. A. V. as to be incompetent to pass on its validity under international law. Finally, although it can be argued that nationalistic prejudice could affect decision in cases of this sort, it is also often claimed that other biases in various obnoxious forms are present in the minds of judges in other types of cases. Judges are properly admonished when reminded that judicial duty requires that controversies be decided fairly and without passion, but we also have a duty not to excuse ourselves from exercising the duty of decision when parties and subject matter are properly before us. Thus neither reason nor precedent preclude this court from considering the appellees' contentions, based upon international law concepts, that the court below should be affirmed.

Farr, Whitlock contends that the decree of August 6, 1960, nationalizing the Cuban property owned by American corporations was a violation of international law on three grounds: Adequate compensation was not provided; the purpose of the seizure was retaliation against the United States; and the expropriation was discriminatory in operation.

The Supreme Court has said:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. (*The Paquete Habana*, 175 U. S. 677, 700 (1900).)

See *The Nereide*, 13 U. S. (9 Cranch) 388 (1815); *United States* v. *Smith*, 18 U. S. (5 Wheat.) 153 (1820); *The Scotia*, 81 U. S. (14 Wall.) 170 (1871); 1 Oppenheim, International Law 41-42 (8th ed. 1955). In the absence of any relevant [fol. 220] treaty, enactment of the legislature, act of the executive, or controlling judicial decision, we have been told to draw the guiding concepts of international law from the customs and usages of civilized nations. *The Paquete Habana, supra.* It would seem that this statement requires at least one qualification. International law is derived indeed from the customs and usages of civilized nations, but its concepts are subject to generally accepted principles of morality whether most men live by these principles or not. See Statute of the International Court of Justice art. 38, 1946-47 U. N. Yearbook 843. *But see The Antelope*, 23 U. S. (10 Wheat.) 66 (1825). Judges of municipal courts, the bulk of whose decisions involve questions under a domestic law derived from a long-established and increasingly elaborate national legal system, will often find themselves unfamiliar with the ratiocination necessary for decision in this area, where recognized precedent and accepted authority are scant. Anyone who undertakes a search for the principles of international law cannot help but be aware of the nebulous nature of the substance we call international law. See Rado, *Czechoslovak Nationalization Decrees: Some International Aspects*, 41 Am. J. Int'l L. 795, 797 (1947). The lack of effective international remedies doubtless contributes to this state of affairs. See Falk, *Toward a Theory of the Participation of Domestic Courts in the International Legal Order: a Critique of Banco Nacional de Cuba v. Sabbatino*, 16 Rutgers L. Rev. 1, 2 & n. 3 (1961). But until the day of capable international adjudication among coun-

tries, the municipal courts must be the custodians of the concepts of international law, and they must expound, apply, and develop that law whenever they are called upon to do so. See Lauterpacht, *Re Helbert Wagg: A Further Comment*, 5 Int'l & Comp. L. Q. 301 (4th Ser. 1956); Falk, *supra* at 2.

[fol. 221] One pitfall into which we could stumble would be the identification as a fundamental principle of international law of some principle which in truth is only an aspect of the public policy of our own nation and not a principle so cherished by other civilized peoples. In avoiding such an identification we must take a more cosmopolitan view of things and recognize that the rule of law which we municipally announce must be a rule applicable to sovereignties with social and economic patterns very different from our own. See Sorensen, *The International Court of Justice: Its Role in Contemporary International Relations*, 14 Int'l Org. 261, 273 (1960). Castaneda, *The Underdeveloped Nations and the Development of International Law*, 15 Int'l Org. 38-44 (1961); Isaacson, International Law and Public Policy, 1961 (unpublished paper in Yale Law School Library). With these principles in mind, we proceed to a consideration of whether the decree under which the appellant claims it received good title to the sugar was in violation of international law.

The appellant argues that the Cuban decree against C. A. V. did not violate international law because C. A. V. was organized under the laws of Cuba. It is generally accepted, as appellant says, that acts of a state directed against its own nationals do not give rise to questions of international law. Zander, *The Act of State Doctrine*, 53 Am. J. Int'l Law 826, 836 (1959); 1 Oppenheim, International Law, 268 n. 2 (8th ed. 1955); Friedman, Expropriation in International Law 163 (1953); see *M. Salimoff & Co.* v. *Standard Oil Co.*, 262 N. Y. 220, 186 N. E. 679 (1933). But over ninety per cent of C. A. V.'s shareholders were United States nationals; and the Cuban decree which expropriated C. A. V.'s property clearly indicated that the property was seized because C. A. V. was owned and controlled by Americans. When a foreign state treats a cor-

[fol. 222] poration in a particular way because of the na-

tionality of its shareholders, it would be inconsistent for us in passing on the validity of that treatment to look only to the "nationality" of the corporate fiction. The more frequent practice in international litigation and negotiation seems to be that the nationality of the corporation is disregarded when it is different from the nationality of most of the corporation's shareholders. See *El Triunfo*, 2 Moore, International Law 649-51, [1902] Foreign Rel. U. S. 859-73; Tlahualilo, 5 Hackworth, International Law 842, [1913] Foreign Rel. U. S. 993; *Alsop* [1910] Foreign Rel. U. S. 138-89, [1911] *id.* 38; *Charbonnage Frederic Henri S. A.* v. *Germany*, [1919-22] Ann. Dig. 227; *Baron de Neuflize* v. *Germany*, [1927-28] Ann. Dig. 323-24; *Romano-Americana*, 5 Hackworth, International Law, 702-05, [1926] 2 Foreign Rel. U. S. 313, [1928] 2 Foreign Rel. U. S. 957, [1929] 3 Foreign Rel. U. S. 757; Friedman, *op. cit. supra* at 171; *Delagoa Bay*, 2 Moore, International Arbitration 1865, 1874, [1902] Foreign Rel. U. S. 848, 849. Thus we shall place no significance for present purposes on the fact that C. A. V. was chartered in Cuba.

The first aspect of the nationalization of C. A. V.'s property which the appellees ask us to consider is the fact that the decree authorizing the seizure did not provide for the payment of adequate compensation.[9] The patent inadequacy of the remuneration for the property seized is set forth in the provisions of Law 851, under which the decree of expropriation was issued. See State Dept. Note No. 397, July 16, 1960 (to Cuban Ministry of Foreign Relations). An illusory compensation took the form of an issue of Cuban Government Bonds having terms of not less than [fol. 223] thirty years and bearing interest at less than two per cent per annum. This interest was to be paid exclusively out of a fund to be set up by the appellant bank, which fund would consist of twenty-five per cent of the foreign exchange received by Cuba from its annual sales to the United States of Cuban sugar in excess of three million Spanish long tons at a price of not less than 5.75 cents per

[9] If there had been adequate compensation for the seizure, regardless of the other circumstances surrounding the expropriations, it would be very difficult to find any violation of international law.

English pound (f.a.s.). The bonds were also to be amortized out of this fund under authority vested in the President of Cuba to decide to what extent the bonds would be amortized over a period of not less than thirty years. The Cuban President and Prime Minister were to select the appraisers who would value the expropriated property for compensation purposes. It is unclear whether the bonds would be paid at maturity if the fund were insufficient to cover payment. The possibility that there would be any fund at all was little more than a travesty. For the ten years immediately preceding the nationalization of C. A. V.'s property the average price this country paid to Cuba for raw sugar never exceeded 5.50 cents per English pound (f.a.s.), see H. R. Rep. 1746, 86th Cong., 2d Sess. 16 (1960); but to finance the fund the Cuban Government demanded 5.75 cents per pound, only one quarter of which would go into the fund. Moreover, in only one of the immediately preceding ten years had Cuba sold this country more than three million Spanish long tons of 2,272 English pounds each and in only three years out of the whole period from 1934 through 1959 had she sold us that much sugar, see H. R. Rep. 1746, *supra* at 5; but contributions would be made into the fund only out of yearly sales to the United States in excess of three million Spanish tons. In short, there would be no interest and no amortization, full compensation at maturity of the bonds would be highly unlikely, and there would be no market value for the bonds.

[fol. 224] But is the failure to provide adequate compensation for the compulsory taking of the property of a domestically chartered corporation owned by alien stockholders a violation of international law? The constitutions of most of the states in the Western Hemisphere contain language which appears to uphold the right of the owner to receive just compensation upon a governmental taking of private property. Lord McNair stated as one postulate of international law:

> "The nationalization must be accompanied either by contemporaneous payment of adequate compensation or effective measures which ensure and make certain its prompt payment."

McNair, *The Seizure of Property and Enterprises in Indonesia*, 6 Netherlands Int'l L. Rev. 218, 243 (1959).

The United States Department of State has asserted this proposition to foreign countries on numerous occasions.[10] The Restatement, Foreign Relations Law of the United States §190(b) (Proposed Official Draft 1962) is to the same effect:

> §190. When Taking is Wrongful Under International Law
>
> The taking by a state of property of an alien is wrongful under international law if • • •
>
> (b) it is not accompanied by payment of just compensation or, under the law and practice of the state [fol. 225] in effect at the time of taking, there is not reasonable provision for the determination and payment of just compensation • • •

A number of decisions by international tribunals have upheld the principle that just compensation should be provided.[11] And it appears that most of the writers on the

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[10] E.g., Note of August 22, 1938, to Mexico in 3 Hackworth Int'l Law 658-59 (1942); Note of July 21, 1938, to Mexico in 3 Hackworth, *op. cit. supra* at 656; Note of April 3, 1940, to Mexico in 3 Hackworth, *op. cit. supra* at 662; Note of August 28, 1953, to Guatemala in 29 Dep't State Bull. 357 at 359 (1953).

[11] E.g., *Chorzow Factory Case* (Indemnity), P.C.I.J. Judgment No. 13, September 13, 1928, ser. A. No. 17, 1 Hudson, World Court Reports 646, 677; *German Interest in Polish Upper Silesia* (Merits), P.C.I.J. Judgment No. 7, May 25, 1926, ser. A., No. 7, 1 Hudson, World Court Reports 510, 523-24; *Norwegian Shipowners' Claims* (Norway/United States), 1 U.N. Rep. Int'l Arb. Awards, 307, 334 (Perm. Ct. Arb. 1921); *Arabian-American Oil Company* v. *Saudi Arabia*, Award of Arbitral Tribunal, Geneva, 1956, at 61, 101-02, 109, 127, portions of award quoted in 6 Netherlands Int'l L. Rev. 233-34 (1959); *Marguerite de Joly de Sabla* (United States/Panama), 6 U.N. Rep. Int'l Arb. Awards 358, 366 (1933); *Arbitral Award Between Portugal and Germany*, June 30, 1930, 2 U.N. Rep. Int'l Arb. Awards 1035, 1039 (1930); *Shufeldt Claim* (United States/Guatemala), 2 U.N. Rep. Int'l

subject have asserted that just compensation for governmental taking is a requirement of international law.[12]

Arb. Awards 1079, 1095 (1930); *Affaire Goldenberg* (Germany/Rumania), 2 U.N. Rep. Int'l Arb. Awards 901, 909 (1928); *Spanish Zone of Morocco Case* (Great Britain/Spain), 2 U.N. Rep. Int'l Arb. Awards 615, 647 (1925); *Landreau Claim* (United States/Peru), 1 U.N. Rep. Int'l Arb. Awards 347, 365 (1921); *Selwyn's Case* (United States/Venezuela), Ralston, Venezuelan Arbitrations of 1903, at 322 (1904).

[12] See Restatement, Foreign Relations Law of the United States, §190, comment a (Proposed Official Draft, 1962); Anderson, Title to Confiscated Foreign Property, 20 Am. J. Int'l L. 528-29 (1926); —— Basis of the Law Against Confiscating Foreign-Owned Property, 21 Am. J. Int'l L. 525 (1927); Baxter & Sohn, Convention on State Responsibility, art. 10 (Draft No. 12, 1961); Bindschedler, Verstaatlichungmassnahmen und Entschadigungspflicht nach Volkerrecht 111 (1950); Doman, Postwar Nationalization of Foreign Property in Europe, 48 Colum. L. Rev. 1125, 1130-31 (1948); —— Compensation for Nationalized Property in Post-war Europe, 3 Int'l L. Q. 323 (1950); Domke, Indonesian Nationalization Measures Before Foreign Courts, 54 Am. J. Int'l L. 305 (1960); Fachiri, Expropriation and International Law, 6 Brit. Yb. Int'l L. 159 (1925); —— International Law and the Property of Aliens, 10 Brit. Yb. Int'l L. 32 (1929); Fauchille & Sibert, 32 Revue Generale de Droit Int'l Public 5, 22 (1925); LaLai Agraire Lithuanienne; Fawcett, Some Foreign Effects of Nationalization of Property, 27 Brit. Yb. Int'l L. 355 (1950); Friedmann, Some Impacts of Social Organization on International Law, 50 Am. J. Int'l L. 475, 505 (1956); 1 Hyde, International Law Chiefly as Interpreted and Applied by the United States 710-25 (2d rev. ed. 1947); Kaufman, Regles Generales du Droit de la Paix, 54 Hague Recueil 313, 429 (1935); Kunz, The Mexican Expropriations, 17 N. Y. U. L. Rev. 327, 344 (1940); Peselj, International Aspects of the Recent Yugoslav Nationalization Law, 53 Am. J. Int'l L. 428 (1959); Rado, Czechoslovak Nationalization Decrees; Some International Aspects, 41 Am. J. Int'l L. 795 (1947); Re, The Nationalization of Foreign-Owned Property, 36 Minn. L. Rev. 323, 328 (1952); Scelle, 2 Precis de droit des gens 113 (1934); Scheuner in Report of 48th Conference of the Int'l Law Association, 164 (1958); Schindler, Besitzen konfiskatorische Gesetze ausserterritoriale Wirkung?, 3 Schweizerisches Jahrbuch fur Internationales Recht 65, 94 (1946); 1 Schwarzenberger, International Law 205 (3d ed. 1957); Schwebel in Report of 48th Conference of the Int'l Law Association 150 (1958); Verdross, Die Nationalisierung Niederlandischer Unternehmungen in Indonesian im Lichte des Volkerrects, 6 Netherlands Int'l L. Rev. 278 (1959); Weiss-

[fol. 226] But some writers have asserted that the payment of adequate compensation is not required by international law. Friedman, Expropriation in International Law 206 (1953); Baade, *Indonesian Nationalization Measures before Foreign Courts—A Reply*, 54 Am. J. Int'l L. 801, 803-04 (1960); Williams, *International Law and the Property of Aliens*, Brit. Yb. Int'l L. 1 (1928); see Brierly, Law of Nations 178 (2d ed. 1936); Isaacson, International Law and Public Policy 1961 (unpublished paper in Yale Law School Library). *Cf.* Baade, *supra* at 834. Tremendous social and cultural changes are occurring in many parts of the world today. Many countries have acted upon the principle that, in order to carry out desired economic and social reforms of vast magnitude, they must have the right to seize private property without providing compensation for the taking. They argue that because of the paucity of [fol. 227] funds in their governmental coffers it would be impossible to carry out large-scale measures in the name of social welfare if they had to provide compensation immediately, or even if required of them later. The Reporter of the Restatement, Foreign Relations Law of the United States frankly admits that some states including ones in Latin America besides Cuba, do not recognize any requirement to pay compensation.[13] It is commonplace in many

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Tessbach in Report of 48th Conference of the Int'l Law Association 179-80 (1958); 2 Whiteman, Damages in International Law 1386 (1937); Wortley, Observations on the Public and Private International Law Relating to Expropriation, 5 Am. J. Comp. L. 577, 591 (1956). See generally Wortley, Expropriation in Public International Law 33-36 (1959).

[13] *Position of Latin American states.* The rule stated in this Section is questioned by some states, especially in Latin America. Not only do they maintain the general position, explained in Comment *a* to §169, that aliens are entitled to no better treatment than nationals, but they have insisted specifically that international law imposes no duty to pay compensation when property is taken pursuant to a general program of social or economic reform. See, *e.g.*, Mexican Minister of Foreign Affairs to Secretary of State of the United States, August 3, 1938, 3 Hackworth, Digest of International Law, 657 (1942). §190 Reporters' Notes.

See also U.N. Gen. Ass, Off. Rec. 7th Sess., 2d Comm. 286 (1952) (remarks of representative of Iran); *id.* at 287 (remarks of repre-

parts of the world for a country not to pay for what it takes. See Falk, *supra* at 32. Since it is unnecessary for this court in the present case to decide whether a government's failure, in and of itself, to pay adequate compensation for the property it takes is a breach of international responsibility, we decline at this time to attempt a resolution of that difficult question.

Instead, we narrow the question for decision to the following: Is it a violation of international law for a country to fail to pay adequate compensation for the property it seizes from *a particular class of aliens, when the purpose for the seizure of the property is to retaliate against the homeland of those aliens and when the result* [fol. 228] *of such seizure is to discriminate against them only.* To answer this more limited question we must now consider the retaliatory purpose and the discriminatory operation of the nationalization decree here involved. It should appear obvious that these two features of the decree are closely related to one another.

The history of the relations between the United States and the Castro government in the period immediately preceding the decree of expropriation, as well as the words of the decree itself, demonstrate that one of the fundamental purposes of the confiscation was retaliation against this country. On July 6, 1960, Congress amended the Sugar Act of 1948, 61 Stat. 922 (1947), as amended, 7 U. S. C. §1100-61 (1958, Supp. III, 1962), so as to permit the President to reduce the sugar quota allotted to Cuba for the period extending through March 31, 1961. 74 Stat. 330 (1960); as amended, 7 U. S. C. §1158 (Supp. III, 1962). Under the law as it stood before this amendment, Cuba would have had the option to supply sugar to this country in excess of the basic quota allotted to her, since sugar growers in this country were finding it impossible to fill the quota allotted to them. 70 Stat. 219 (1956), 7 U. S. C. §1114(a) (1958). See 106 Cong. Record 14680 (1960) (remarks of Senator Long). The Secretary of State testified before the

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sentative of Mexico); see generally Brandon, Nationalization Before the United Nations, Fifth International Conference of the Legal Profession 38 (1954).

House Committee on Agriculture that the purpose of the amendment was to secure an adequate supply of sugar. He said that Cuba, which had in the past provided about one-third of the sugar consumed in the United States, might not remain a reliable source of sugar because of the increasing diversification of her economy, and because of her commitments to supply sugar to certain Communist countries. He added that "other circumstances" also made it appropriate for Congress to pass the legislation. *Hearings* [fol. 229] *Before House Committee on Agriculture on H. R. 12311, H. R. 12534, and H. R. 12624,* 86th Cong., 2d Sess. 3-5 (1960). Other legislative history made it abundantly clear that the main purpose of the amendment was to impose a sanction against an unfriendly nation. *E.g.*, 106 Cong. Record 15228-48, 15711-29 (1960). On the day following the passage of this legislation, July 7, 1960, the President greatly reduced the sugar quota allotted to Cuba. Proclamation No. 3355, 25 Fed. Reg. 6414 (1960).

In Havana on the same day that the Congress of the United States passed the amendment to the Sugar Act of 1948 by which a reduction in Cuba's sugar quota was authorized, the Cuban Council of Ministers promulgated Law No. 851, which gave the President and Prime Minister of Cuba joint authority to expropriate American property in Cuba. That this law was promulgated as an answer to the amendment to the American Sugar Act is clear from its preamble.[14] Then, on August 6, 1960, pursuant to Law

[14] The first paragraph of the preamble to Law No. 851 states as follows:

> WHEREAS, the attitude assumed by the government and the Legislative Power of the United States of North America, which constitutes an aggression, for political purposes, against the basic interests of the Cuban economy, as recently evidenced by the Amendment to the Sugar Act just enacted by the United States Congress at the request of the Chief Executive of that country, whereby exceptional powers are conferred upon the President of the United States to reduce the participation of Cuban sugars in the American sugar market as a threat of political action against Cuba, forces the Revolutionary Government to adopt, without hesitation, all and whatever measures it may deem appropriate or desirable for the due defense of the national sovereignty and protection of our economic development process.

No. 851, Executive Power Resolution No. 1 was issued, expropriating the Cuban assets of C. A. V., along with the assets of twenty-five other corporations owned by United [fol. 230] States nationals. The preamble of the executive resolution included language almost identical with that in Law No. 851. See *supra* at 2434. Thus we have no doubt that one of the basic reasons for the seizure here involved was to retaliate against the reduction by the United States in the sugar quota it had allotted to Cuba.

Several authorities have announced that confiscation of the property of the nationals of a particular country without the payment of compensation when done as an act of retaliation is contrary to international law. The American Branch of the International Law Association's Committee on Nationalization of Property has stated: "[U]nder International law, a State may not take foreign interests as a measure of political reprisal." American Branch of the International Law Association, Proceedings and Committee Reports 68 (1957-58). Restatement, Foreign Relations Law of the United States §205 & Ill. 1 (Proposed Official Draft, 1962) supports this proposition. Lord McNair declared in regard to Indonesian seizures of Dutch property during the dispute between the Netherlands and Indonesia over control of Dutch New Guinea:

> "In my opinion the absence of a *bona fide*, social or economic purpose involving the property nationalized is vital and alone suffices to render unlawful the [Indonesian] Nationalization Act of 1958 • • • "
>
> McNair, *The Seizure of Property and Enterprises in Indonesia*, 6 Netherlands Int'l L. Rev. 218, 243 (1959).

And in *Anglo-Iranian Oil Co.* v. *S. U. P. O. R. Co.*, Italian Civil Court of Rome, 1954, [1955] Int'l L. Rep. 23, 42, the court stated:

> [fol. 231] "Italian courts must refuse to apply in Italy any foreign law which decrees an expropriation, not for reasons of public interest, but for purely political persecutory, discriminatory, racial and confiscatory motives."

See Seidl-Hohenveldern, *Title to Confiscated Foreign Property and Public International Law*, 56 Am. J. Int'l Law 507, 509-10 (1962); Falk, *supra*, at 9; see also Netherlands note to Indonesia, December 18, 1959, 54 Am. J. Int'l L. 484, 485-86 (1960); *Senembah Maatschappij N.V.* v. *Republiek Indonesie Bank Indonesia and De Twentsche Bank N.V.*, Court of Appeals of Amsterdam, [1959] Nederlandse Jurisprudentie 218 (No. 73), *aff'd*, [1959] Nederlandse Jurisprudentie 855 (No. 350). Unlike the situation presented by a failure to pay adequate compensation for expropriated property when the expropriation is part of a scheme of general social improvement, confiscation without compensation when the expropriation is an act of reprisal does not have significant support among disinterested international law commentators from any country. And despite our best efforts to deal fairly with political and social doctrines vastly different from our own, we also cannot find any reasonable justification for such procedure. Peacetime seizure of the property of nationals of a particular country, as an act of reprisal against that country, appears to this court to be contrary to generally accepted principles of morality throughout the world.

The appellant seeks to justify retaliatory confiscation by the Cuban government by asserting that the United States was the first offender against international law by an attempt to coerce Cuba through the reduction of American purchases of Cuban sugar. If the United States had [fol. 232] seized Cuban assets in this country without compensating the owners, we might find some merit in this contention, for then Cuba would be treating American nationals exactly as the United States was treating Cuban nationals. *Cf.* Restatement, Foreign Relations Law of the United States, §205 (Proposed Official Draft, 1962). But, whether she was wise or unwise, fair or unfair, in what she did, the United States did not breach a rule of international law in deciding, for whatever reason she deemed sufficient, the sources from which she would buy her sugar. We cannot find any established principle of international jurisprudence that requires a nation to continue buying commodities from an unfriendly source. Accordingly it follows

that the amendment to the Sugar Act of 1948 did not excuse Cuba's prima facie breach of international law.

We come now to the issue of whether this retaliation involved a discrimination against United States nationals of such a nature as to render the expropriation invalid under international law. By referring only to United States nationals, Law No. 851 and the decree of expropriation issued thereunder would appear to be discriminatory, since retaliation against a person's homeland is not a reasonable basis for a distinction in treatment. But the appellant points out that under the Agrarian Reform Law and the Urban Reform Law, the Castro government confiscated the property of persons who were not United States nationals; and that the sugar enterprises owned by Cubans were expropriated on October 13, 1960, under yet another law, Law No. 890. Under the Agrarian Reform Law and the Urban Reform Law all large land holdings and multi-family dwellings were nationalized. These latter two pieces of legislation are of little relevance to the present case because of the substantial differences, in both policy and [fol. 233] effect, between the nationalization of real estate as such, and the nationalization of the means of production as such. But the seizure of Cuban-owned sugar enterprises on October 13, 1960, does bear directly upon whether the Cuban government discriminated against American-owned corporations, for it is obvious, of course, that the confiscation of Cuban-owned enterprises was not part of an effort by the Cuban government to retaliate against the United States. If the ultimate effect of all the expropriations by the Castro Cuban government was to treat Cuban-owned enterprises and American-owned enterprises exactly alike, it would be difficult for this court to find discrimination against American nationals. And, perhaps, international law is not violated when equal treatment is accorded aliens and natives, regardless of the quality of the treatment or the motives behind that treatment. See Williams, *International Law and the Property of Aliens*, 9 Brit. Yb. Int'l L. 1, 15 (1928). *But see* Restatement, Foreign Relations Law of the United States §169 & Comment a (Proposed Official Draft, 1962). Foachiri, *Ex-*

propriation and International Law, 6 Brit. Yb. Int'l L. 159, 160 (1925); Kaeckenbeeck, *The Protection of Vested Rights in International Law,* 17 Brit. Yb. Int'l L. 1, 16 (1936); 2 Hyde International Law 876 (1945).

But there was a difference between the treatment of American-owned sugar enterprises and Cuban-owned sugar enterprises. American-owned sugar enterprises were expropriated on August 6, 1960; Cuban-owned sugar enterprises were not seized until October 13, 1960. A short lapse of time between similar provisions in the same program, standing alone, would not create discrimination. But the difference in time here is quite significant, because the shipment of sugar involved in this case left Cuba and was sold abroad between August 6 and October 13. [fol. 234] And this difference of ten weeks' time stems directly from the efforts of the Cuban government to retaliate against the United States and its sugar-buying policy. Since we have held above that seizure of the assets of nationals of an unfriendly sovereign as part of a scheme of reprisal against that country is illegal under international law, it follows that a difference in the treatment accorded those nationals based upon reprisal is discriminatory. Therefore, at least with respect to the shipment of sugar here in question, the Cuban government discriminated against United States nationals.

When a state treats aliens of a particular country discriminatorily to their detriment, that state violates international law. Restatement, Foreign Relations Law of the United States, §170 & Ill. 2 (Proposed Official Draft, 1962); *British Claims in the Spanish Zone of Morocco* [1925] 2 U. N. Rep. Int'l Arb. Awards 615, 647 (Britain/Spain); *Standard Oil Tankers Case,* 22 Am. J. Int'l L. 404, 419-20 (1928); United States note to Rumania, 19 Dep't State Bull. 408 (1948); Netherlands note to Indonesia, December 18, 1959, 54 Am. J. Int'l L. 484, 485-87 (1960); Rolin, 6 Netherlands Int'l L. Rev. 260, 269 (1959); Foighel, Nationalization: A Study in the Protection of Alien Property in International Law, 47 (1957); Van Hecke, *Confiscation, Expropriation and the Conflict of Laws,* 4 Int'l L. Q. 345 (1951); Sohn, in Proceedings and Committee Reports of

the American Branch of the International Law Association 1959-1960, at 31; Verdross, Die Nationalisierung Nederlandischer Unternechmungen in Indonesien Im Lichte Des Volkerrects, 6 Netherlands Int'l L. Rev. 278 (1959). See also *The Oscar Chinn Case*, P. C. I. J. ser. A/B No. 63 [1934], 3 Hudson, World Court Reports 416, 438. Certain circumstances may exist which would permit a state to treat all aliens differently from its own citizens, but those [fol. 235] circumstances are not present in this case. See Restatement, Foreign Relations Law of the United States §170, comment a (Proposed Official Draft, 1962).

Since the Cuban decree of expropriation not only failed to provide adequate compensation but also involved a retaliatory purpose and a discrimination against United States nationals, we hold that the decree was in violation of international law.

But that is not the end of the matter. We must consider whether the one whose property has been thus expropriated has no recourse except against the expropriator to obtain the just compensation not paid to him, or whether he may attack in the courts of the United States the validity of the expropriator's title. *Compare* Domke, *Foreign Nationalizations*, 55 Am. J. Int'l L. 585, 610-15 (1961), *and* Wortley, *Indonesian Nationalization Measures —an Intervention*, *id.* at 680, *with* Baade, *Indonesian Nationalization Measures Before Foreign Courts—A Reply*, 54 Am. J. Int'l L. 801 (1960). If the appellant's title was not rendered void, Farr, Whitlock was guilty of conversion of the bills of lading and the proceeds of the sale even though C. A. V. has not been compensated for the taking. It has been argued that the wrong under international standards is not in the taking but in the failure to pay compensation for the taking. It has been pointed out, moreover, that international tribunals have never granted restitution of the property taken. Therefore, the argument runs, the expropriator must have good title to the property seized subject to a duty to pay damages for the injury caused. But international tribunals are not the sole custodians of international law. As we stated earlier in this opinion, municipal courts also play a part in the

development of that body of law. See Coerper, *The Act* [fol. 236] *of State Doctrine in the Light of the Sabbatino Case*, 56 Am. J. Int'l L. 143, 147 (1962); Falk, *supra* at 2. Furthermore, municipal courts are competent to give a restitutory remedy. In fact, the New York court which holds the proceeds from the sale of sugar involved in the present case is in such a position. We need not at present go into the question whether the granting of this type of remedy is a feature of international law or of domestic law. But we do suggest that the failure of an international tribunal to give a remedy of this type results from the inability of that kind of court to enforce its awards and is not a result of the dictates of substantive international law principles.[15]

Refusal by municipal courts of one sovereignty to sanction the action of a foreign state done contrary to the law of nations will often be the only deterrent to such violations. More important, the only relief open to persons injured by a confiscation will often be the invalidation by a municipal court of the violating country's title to the goods in question. See Note, *The Castro Government in American Courts: Sovereign Immunity and the Act of State Doctrine*, 75 Harv. L. Rev. 1607, 1617-18 (1962). This is particularly true in the present case because Art. 6 of Law No. 851 explicitly precludes review of the confiscation by the Cuban courts. And no aid appears to be available through diplomatic channels to the injured parties. Therefore, we conclude that, since the Cuban decree [fol. 237] violated international law, the appellant's title

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[15] This court does not hope to resolve this legalistic analogue to the dispute over whether the chicken or the egg came first. If one believes legal rights exist separate from and prior to the existence of legal remedies, he may interpret our holding to mean that we have recognized an international wrong and have then fashioned an appropriate remedy. If, on the other hand, the reader believes legal rights cannot exist in the absence of legal remedies, he is free to interpret our words as meaning that since municipal courts can grant a remedy which divests an international title, the appellant's title is invalid.

is invalid and the district court was correct in dismissing the complaint.[16]

Judgment affirmed.

[16] We mention one further problem related to this case which we find unnecessary to settle but which may arise to torment some future court with a case similar to the present one. That problem is whether the law governing this case involves elements of federal law or whether the case is governed solely by New York law. Cf. *Bergman* v. *De Sieyes*, 170 F. 2d 360 (2 Cir. 1948). It has been said that the act of state doctrine is part of the law of conflict of laws. If that is so, it would seem that under the rule in *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U. S. 487 (1941), it is New York law which we are applying. On the other hand, certain cases have indicated that international law is part of the body of federal law. See, e.g., *The Lusitania*, 251 Fed. 715, 732 (S. D. N. Y. 1918). Perhaps *Erie R.R.* v. *Tompkins* has changed the rule in these latterly mentioned cases. *But see* 1 Oppenheim, International Law 41 n. 4 (8th ed. 1955). For our purposes here we do not have to resolve these questions because it appears to us that a New York court would reach the same result we reach. Cf. *Frenkel & Co.* v. *L'Urbaine Fire Ins. Co.*, 251 N. Y. 243, 167 N. E. 430 (1929) (alternative holding); *Fred S. James & Co.* v. *Second Russian Ins. Co.*, 239 N. Y. 248, 146 N. E. 369 (1925); *Sulyok* v. *Penzintezeti Kozpont Budapest*, 279 App. Div. 528, 111 N. Y. S. 2d 75, *modified on other grounds*, 304 N. Y. 704, 107 N. E. 2d 604 (1952) *(per curiam)*; *Schwartz* v. *Compania Azucarera Vertientes-Camaguey De Cuba*, 208 N. Y. S. 2d 833 (Sup. Ct. 1960). See also Falk, *supra* at 11.

[fol. 238]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Present: Hon. Sterry R. Waterman, Hon. Irving R. Kaufman, Hon. Thurgood Marshall, Circuit Judges.

BANCO NACIONAL DE CUBA, Plaintiff-Appellant,

v.

PETER L. F. SABBATINO, as Receiver, and F. SHELTON FARR, WILLIAM F. PRESCOTT, EMET WHITLOCK, et al., co-partners, d/b/a FARR, WHITLOCK & Co., Defendants-Appellees.

JUDGMENT—July 6, 1962

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro, Clerk.

[fol. 239] [File endorsement omitted]

[fol. 240] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 241]

SUPREME COURT OF THE UNITED STATES

No. 403—October Term, 1962

BANCO NACIONAL DE CUBA, Petitioner,

vs.

PETER L. F. SABBATINO, ETC., et al.

ORDER ALLOWING CERTIORARI—February 18, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.